

STATE PERSONNEL BOARD CALENDAR



DECEMBER 6, 2005

SAN FRANCISCO, CALIFORNIA

State of California

Memorandum

DATE: November 23, 2005

TO: ALL INTERESTED PARTIES

FROM: STATE PERSONNEL BOARD – Executive Division

SUBJECT: Notice and Agenda for the **December 6, 2005**, meeting of the State Personnel Board.

PLEASE TAKE NOTICE that on December 6, 2005, at the **Civic Center, Benicia Room, located at 455 Golden Gate Avenue, San Francisco, California, 94102**, the State Personnel Board will hold its regularly scheduled meeting. Pursuant to Government Code section 11123, a teleconference location may be conducted for this meeting at 320 W. 4th Street, Los Angeles, California.

The attached Agenda provides a brief description of each item to be considered and lists the date and approximate time for discussion of the item.

Also noted is whether the item will be considered in closed or public session. Closed sessions are closed to members of the public. All discussions held in public sessions are open to those interested in attending. Interested members of the public who wish to address the Board on a public session item may request the opportunity to do so.

Should you wish to obtain a copy of any of the items considered in the public sessions for the December 6, 2005, meeting, please contact staff in the Secretariat's Office, State Personnel Board, 801 Capitol Mall, MS 22, Sacramento, California 95814 or by calling (916) 653-0429 or TDD (916) 654-2360, or the Internet at:

<http://www.spb.ca.gov/calendar.htm>

Should you have any questions regarding this Notice and Agenda, please contact staff in the Secretariat's Office at the address or telephone numbers above.



P. Fong
Secretariat's Office

Attachment



CALIFORNIA STATE PERSONNEL BOARD MEETING¹

801 Capitol Mall
Sacramento, California

Public Session Location –

**Civic Center, Benicia Room
455 Golden Gate Avenue
San Francisco, CA 94102**

Teleconference – 320 West 4th Street²
Los Angeles, California, Suite 620

Closed Session Location –

Civic Center, Benicia Room
455 Golden Gate Avenue
San Francisco, CA 94102

Teleconference – 320 West 4th Street
Los Angeles, California Suite 620

FULL BOARD MEETING – DECEMBER 6, 2005

¹ Sign Language Interpreter will be provided for Board Meeting upon request - contact Secretariat at (916) 653-0429, or CALNET 453-0429, TDD (916) 654-2360.

²Pursuant to Government Code section 11123, a teleconference location may be conducted for this meeting at 320 West 4th Street, Los Angeles, California.

FULL BOARD MEETING AGENDA³

DECEMBER 6, 2005
9:00 a.m. – 4:00 p.m.
(or upon completion of business)

PLEASE NOTE: ALL TIMES ARE APPROXIMATE AND ARE SUBJECT TO CHANGE

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(9:00 a.m. – 9:30 a.m.)

- 1. ROLL CALL**
- 2. REPORT OF THE EXECUTIVE OFFICER – Floyd D. Shimomura**
- 3. REPORT ON THE PUBLIC EMPLOYEES RETIREMENT SYSTEM (PERS)
– Ron Alvarado**
- 4. REPORT OF THE CHIEF COUNSEL – Elise Rose**
- 5. NEW BUSINESS**

Items may be raised by Board Members for scheduling and discussion for future meetings.

- 6. REPORT ON LEGISLATION – Sherry Hicks**

The Board may be asked to adopt a position with respect to the bills listed on the legislation memorandum attached hereto.

- 7. ELECTION OF BOARD OFFICERS**

In accordance with Article VII, Section 2(b), the five-member Personnel Board (Board) will elect one of its members as presiding officer, to serve as the President for the calendar year 2006.

The Board will also elect a Vice President.

Additionally, in accordance with Government Code Section 20090 the Board will select one of its members to serve as their representative to the Public Employees' Retirement Board.

³ The Agenda for the Board can be obtained at the following internet address:
<http://www.spb.ca.gov/calendar.htm>

(9:30 a.m. – 9:45 a.m.)

8. **HEARING – THIRD PUBLIC HEARING ON PROPOSED REVISIONS TO WHISTLEBLOWER RETALIATION COMPLAINT REGULATIONS (Title 2, C.C.R., section 56 et. seq.) – Bruce Monfross**

Proposed revisions to the Whistleblower Complaint Procedures Regulations, which were originally proposed and made available at public hearings conducted on August 30 and October 3, 2005 and in a Notice of Proposed Regulations and Statements of Reasons dated July 8, 2005.

(9:45 a.m. – 10:00 a.m.)

9. **HEARING – THIRD PUBLIC HEARING ON PROPOSED REVISIONS TO DISCOVERY REGULATIONS IN EVIDENTIARY HEARINGS REGULATIONS (Title 2, C.C.R., section 57 et. seq.) – Bruce Monfross**

Proposed revisions to the Discovery in Evidentiary Hearings Regulations, which were originally proposed and made available at hearings conducted on August 3 and October 3, 2005 and in a Notice of Proposed Regulations and Statement of Reasons dated July 8, 2005.

CLOSED SESSION OF THE STATE PERSONNEL BOARD

(10:00 a.m. – 10:30 a.m.)

10. **EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, AND OTHER APPEALS**

Deliberations to consider matter submitted at prior hearing.
[Government Code Sections 11126(d), 18653.]

11. **DELIBERATION ON ADVERSE ACTIONS, DISCRIMINATION COMPLAINTS, AND OTHER PROPOSED DECISIONS SUBMITTED BY ADMINISTRATIVE LAW JUDGES**

Deliberations on matters submitted at prior hearing; on proposed, rejected, remanded, and submitted decisions; petitions for rehearing; and other matters related to cases heard by administrative law judges of the State Personnel Board or by the Board itself. [Government Code Sections 11126 (d), and 18653 (2).]

12. PENDING LITIGATION

Conference with legal counsel to confer with and receive advice regarding pending litigation when discussion in open session would be prejudicial.
[Government Code sections 11126(e)(1) and 18653.]

State Personnel Board v. Department of Personnel Administration,
California Supreme Court Case No. S119498.

State Personnel Board v. California State Employees Association,
California Supreme Court Case No. S122058.

Connerly v. State Personnel Board, California Supreme Court,
Case No. S125502.

International Union of Operating Engineers v. State Personnel Board,
Public Employment Relations Board (PERB) Case No. SA-CE-1295-S.

State Compensation Ins. Fund v. State Personnel Board/CSEA,
Sacramento Superior Court No. 04CS00049.

SEIU Local 1000 (CSEA) v. State Personnel Board,
Sacramento Superior Court No. 05CS00374.

The Copley Press, Inc. v. San Diego Superior Court,
California Supreme Court No. S128603.

Union of American Physicians and Dentists v. Department of Corrections, et al.,
United States District Court, Northern District of California.

13. RECOMMENDATIONS TO THE LEGISLATURE

Deliberations on recommendations to the legislature.
[Government Code section 18653.]

14. RECOMMENDATIONS TO THE GOVERNOR

Deliberations on recommendations to the Governor.
[Government Code section 18653.]

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(10:30 a.m. – 11:00 a.m.)

15. HEARING – ANNUAL CENSUS OF EMPLOYEES IN THE STATE CIVIL SERVICE, 2004-2005 FISCAL YEAR – Matilda Aidam

Government Code sections 19237, 19405, 19705, 19792.5(b) and 19793 require the State Personnel Board to provide the Governor and Legislature with an Annual Report regarding the state civil service workforce. This report covers the 2004-05 fiscal year. SPB staff is requesting the Board to approve this report for submission to the Governor and the Legislature.

(11:00 a.m. – 11:15 a.m.)

16. DISCUSSION OF COMING BOARD MEETING SCHEDULE OF DECEMBER 20, 2005, IN SACRAMENTO, CALIFORNIA

BOARD ACTIONS:

17. ADOPTION OF THE STATE PERSONNEL BOARD SUMMARY MINUTES OF NOVEMBER 1, 2005

- **ADOPTION OF THE PROPOSED STATE PERSONNEL BOARD 2006 BOARD MEETING SCHEDULE**

18. EVIDENTIARY CASES - (See Case Listings on Page 11-15)

19. RESOLUTION EXTENDING TIME UNDER GOVERNMENT CODE SECTION 18671.1 EXTENSION - (See Agenda Page 21-22)

20. NON-EVIDENTIARY CASES - (See Case Listings on Page 15-18)

21. NON-HEARING CALENDAR

The following proposals are made to the State Personnel Board by either the Board staff or Department of Personnel Administration staff. It is anticipated that the Board will act on these proposals without a hearing.

Anyone with concerns or opposition to any of these proposals should submit a written notice to the Executive Officer clearly stating the nature of the concern or opposition. Such notice should explain how the issue in dispute is a merit employment matter within the Board's scope of authority as set forth in the State Civil Service Act (Government Code section 18500 et seq.) and Article VII,

California Constitution. Matters within the Board's scope of authority include, but are not limited to, personnel selection, employee status, discrimination and affirmative action. Matters outside the Board's scope of authority include, but are not limited to, compensation, employee benefits, position allocation, and organization structure. Such notice must be received not later than close of business on the Wednesday before the Board meeting at which the proposal is scheduled. Such notice from an exclusive bargaining representative will not be entertained after this deadline, provided the representative has received advance notice of the classification proposal pursuant to the applicable memorandum of understanding. In investigating matters outlined above, the Executive Officer shall act as the Board's authorized representative and recommend the Board either act on the proposals as submitted without a hearing or schedule the items for a hearing, including a staff recommendation on resolution of the merit issues in dispute.

A. BOARD ITEMS PRESENTED BY STATE PERSONNEL BOARD OR DEPARTMENT OF PERSONNEL ADMINISTRATION TO ESTABLISH, REVISE OR ABOLISH CLASSIFICATIONS, ALTERNATE RANGE CRITERIA, ETC.

THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (CDCR) proposes the establishment of a new classification titled Physician Assistant, Correctional Facility.

B. ABOLISHMENT OF CLASSES THAT HAVE HAD NO INCUMBENTS FOR MORE THAN TWO YEARS. DEPARTMENTS THAT UTILIZE THE CLASS AS WELL AS THE APPROPRIATE UNION HAVE NO OBJECTION TO THE ABOLISHMENT OF THESE CLASSES.

NONE

22. STAFF CALENDAR ITEMS FOR BOARD INFORMATION

NONE

23. CAREER EXECUTIVE ASSIGNMENT (CEA) CATEGORY ACTIVITY

This section of the Agenda serves to inform interested individuals and departments of proposed and approved CEA position actions.

The first section lists position actions that have been proposed and are currently under consideration.

Any parties having concerns with the merits of a proposed CEA position action should submit their concerns in writing to the Classification and Compensation Division of the Department of Personnel Administration, the Merit Employment and

Technical Resources Division of the State Personnel Board, and the department proposing the action.

To assure adequate time to consider objections to a CEA position action, issues should be presented immediately upon receipt of the State Personnel Board Agenda in which the proposed position action is noticed as being under consideration, and generally no later than a week to ten days after its publication.

In cases where a merit issue has been raised regarding a proposed CEA position action and the dispute cannot be resolved, a hearing before the five-member Board may be scheduled. If no merit issues are raised regarding a proposed CEA position action, and it is approved by the State Personnel Board, the action becomes effective without further action by the Board.

The second section of this portion of the Agenda reports those position actions that have been approved. They are effective as of the date they were approved by the Executive Officer of the State Personnel Board.

A. REQUESTS TO ESTABLISH NEW OR REVISE EXISTING CEA POSITIONS CURRENTLY UNDER CONSIDERATION

ASSISTANT DEPUTY DIRECTOR, ENTERPRISE PLANNING AND SERVICES, INFORMATION SERVICES DIVISION

The Department of Motor Vehicles proposes to allocate the above position to the CEA category. The Assistant Deputy Director, Enterprise Planning and Services is responsible for the development and maintenance of policy affecting all facets of Information Technology (IT), including IT policy governing existing IT systems, as well as policy that will facilitate the modernization of the department's information technology infrastructure.

DEPUTY DIRECTOR, COMMUNICATIONS AND PLANNING

The Department of Managed Health Care proposes to allocate the above position to the CEA category. The Deputy Director, Communications and Planning is responsible for planning, implementing and directing a comprehensive public affairs program for all Department of Managed Health Care programs.

MEDIA MANAGER, MEDIA RELATIONS SECTION

The Board of Equalization proposes to reallocate the existing CEA position titled Chief Communications Office to the above position. The Media Manager, Media Relations Section will have a major role in formulating the direction and policy of BOE's overall communication protocol. The position will move down one organizational level and change its reporting relationship.

CHIEF, BOARD PROCEEDINGS DIVISION

The Board of Equalization proposes to reallocate the existing CEA Chief, Board Proceedings Division. The Chief, Board Proceedings Division recommends policies to the Executive Director, the Chief Counsel and the Members of the Board for the effective conduct of the Board's business and the integrity of the tax appeals program. The position will move down one organizational level and change its reporting relationship.

****CORRECTION****

LEGISLATIVE COUNSEL, EXTERNAL AND LEGISLATIVE AFFAIRS

The above position has not been submitted by the Board of Equalization for inclusion into the CEA category.

B. EXECUTIVE OFFICER DECISIONS REGARDING REQUESTS TO ESTABLISH NEW OR REVISE EXISTING CEA POSITIONS

ASSISTANT DEPUTY PROJECT DIRECTOR, PROJECT ADMINISTRATION AND NETWORK SERVICES

The Franchise Tax Board has withdrawn their proposal to allocate the above position to the CEA category effective November 15, 2005.

CHIEF DEPUTY DIRECTOR

The Department of Motor Vehicles proposal to allocate the above position to the CEA category has been disapproved effective August 31, 2005.

24. EMPLOYEE APPOINTMENTS, DISCIPLINARY MATTERS, & OTHER APPEALS

Deliberations to consider matter submitted at prior hearing. [Government Code sections 11126(d), 18653.]

25. PRESENTATION OF EMERGENCY ITEMS AS NECESSARY

26. BOARD ACTIONS ON SUBMITTED ITEMS – (See Agenda - Page 19-20)

These items have been taken under submission by the State Personnel Board at a prior meeting and may be before the Board for a vote at this meeting. This list does not include evidentiary cases, as those are listed separately by category on this agenda under Evidentiary Cases.

(11:15 a.m. – 11:30 a.m.)

**27. STRATEGIC PLANNING SESSION INTRODUCTION
– California State Personnel Board Staff**

LUNCH

(11:30 a.m. – 1:00 p.m.)

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(1:00 p.m. – 1:15 p.m.)

28. STRATEGIC PLANNING SESSION I –

**IMPROVE ACCESS AND DELIVERY OF POLICY AND TECHNICAL MERIT
SYSTEM GUIDANCE TO STAKEHOLDERS
– California State Personnel Board Staff**

(1:15 p.m. – 1:30 p.m.)

29. STRATEGIC PLANNING SESSION II –

**ENSURE AN ADEQUATE NUMBER OF QUALIFIED EMPLOYEES FOR THE
FUTURE TO CARRY OUT THE STATE’S MISSION
– California State Personnel Board Staff**

(1:30 p.m. – 2:15 p.m.)

30. STRATEGIC PLANNING SESSION III –

**ENHANCE COMMUNICATION BETWEEN SPB AND OUR STAKEHOLDERS
AND THE GENERAL PUBLIC – California State Personnel Board Staff**

BREAK

(2:15 p.m. – 2:30 p.m.)

PUBLIC SESSION OF THE STATE PERSONNEL BOARD

(2:30 p.m. – 4:00 p.m.)

31. STRATEGIC PLANNING SESSION IV –

**IMPROVE STATE EMPLOYEE PERFORMANCE TO MORE EFFICIENTLY
SERVE THE PEOPLE OF CALIFORNIA
– California State Personnel Board Staff**

A D J O U R N M E N T

18. EVIDENTIARY CASES

The Board Administrative Law Judges conduct evidentiary hearings in appeals that include, but are not limited to, adverse actions, medical terminations, demotions, discrimination, reasonable accommodations, and whistleblower complaints.

A. BOARD CASES SUBMITTED

These items have been taken under submission by the State Personnel Board at a prior meeting. Cases that are before the Board for vote will be provided under separate cover.

(1) **PATRICK BRASS, CASE NO. 04-1952A**

Appeal from dismissal

Classification: Youth Correctional Counselor

Department: Department of the Youth Authority

Proposed decision rejected July 26, 2005

Transcript prepared

Oral argument heard November 1, 2005, San Diego

Case ready for decision by FULL Board

(2) **GARY GARFINKEL, CASE NO. 98-3128RBA**

Appeal for determination of back salary, benefits and interest

Classification: Deputy Attorney General IV

Department: Department of Justice

Proposed decision rejected July 13, 2005

Transcript prepare

Pending oral argument October 3, 2005, Sacramento

Oral argument continued

Oral argument heard November 1, 2005, San Diego

Case ready for decision by FULL Board

(3) **MARK SAMORA, CASE NO. 04-3041A**

Appeal from dismissal

Classification: Information Technology Consultant

Department: California State University, Los Angeles

Proposed decision rejected July 13, 2005

Transcript prepared

Oral argument heard October 3, 2005, Sacramento

Case ready for decision by FULL Board

B. CASES PENDING

ORAL ARGUMENTS

These cases are on calendar to be argued at this meeting or to be considered by the Board in closed session based on written arguments submitted by the parties.

NONE

C. CHIEF COUNSEL RESOLUTIONS

NONE

COURT REMANDS

This case has been remanded to the Board by the court for further Board action.

NONE

STIPULATIONS

These stipulations have been submitted to the Board for Board approval, pursuant to Government Code, section 18681.

NONE

D. ADMINISTRATIVE LAW JUDGE'S (ALJ) PROPOSED DECISIONS

PROPOSED DECISIONS

These are ALJ proposed decisions submitted to the Board for the first time.

(1) JESUS FLORES, CASE NO. 05-2530

Appeal from 30 work days suspension

Classification: Groundswoker

Department: California State University, Los Angeles

(2) HECTOR J. HUEZO, CASE NO. 04-2747

Appeal from dismissal

Classification: Workers Compensation Insurance Technician

Department: State Compensation Insurance Fund

- (3) **EDMUND LAURENSKI, CASE NO. 05-1072**
Appeal from five percent reduction in pay for six months
Classification: Painter III, Correctional Facility
Department: Department of Corrections
- (4) **SAMUEL LAWANSON, CASE NO. 05-2120**
Appeal from ten percent reduction in salary for twelve months
Classification: Vocational Instructor
Department: Department of Corrections and Rehabilitation
- (5) **PETER MALDONADO, CASE NO. 05-2333**
Appeal from dismissal
Classification: Stationary Engineer
Department: Department of Veterans Affairs
- (6) **ERNEST PITTMAN, CASE NO. 05-1591**
Appeal from dismissal
Classification: Motor Vehicle Field Representative
Department: Department of Motor Vehicles
- (7) **RICHARD QUADRELLI, CASE NO. 05-1039**
Appeal from dismissal
Classification: Caltrans Maintenance Supervisor
Department: Department of Transportation
- (8) **RUBEN C. SALGADO, CASE NO. 04-2045**
Appeal from 10 work days suspension
Classification: Officer
Department: Department of California Highway Patrol
- (9) **RAYMOND D. SLEDGE, CASE NO. 04-2809**
Appeal from dismissal
Classification: Correctional Officer
Department: Department of the Youth Authority
- (10) **ALAN J. SOARES, CASE NO. 05-2649**
Appeal from formal reprimand
Classification: Maintenance Mechanic
Department: Department of Corrections and Rehabilitation
- (11) **JAMES STEED, CASE NO. 05-0207**
Appeal from constructive medical suspension
Classification: Facility Captain
Department: Department of Corrections and Rehabilitation

Proposed Decisions Taken Under Submission At Prior Meeting

These are ALJ proposed decisions taken under submission at a prior Board meeting, for lack of majority vote or other reason.

NONE

PROPOSED DECISIONS AFTER BOARD REMAND

- (12) **ROBERT FINE, CASE NO. 04-2958R**
Appeal from five percent reduction in salary for six pay periods
Classification: Parole Agent I, Adult Parole
Department: Department of Corrections

PROPOSED DECISIONS AFTER SPB ARBITRATION

NONE

E. PETITIONS FOR REHEARING

ALJ PROPOSED DECISIONS ADOPTED BY THE BOARD

The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a case already decided by the Board.

- (1) **KIRK BROWN, CASE NO. 05-1462P**
Appeal from whistleblower retaliation complaint
Classification: Stationary Engineer (Correctional Facility)
Department: Department of Corrections and Rehabilitation
- (2) **STEVEN M. KAMP, CASE NO. 05-1262P**
Appeal from whistleblower retaliation complaint
Classification: Tax Counsel III
Department: State Board of Equalization
- (3) **STEVEN SWAN, CASE NO. 04-1538P & 05-0524P**
Appeal from involuntary transfers
Classification: Correctional Officer
Department: Department of Corrections and Rehabilitation
- (4) **MICHAEL G. YARBOROUGH, CASE NO. 05-0080P**
Appeal from demotion and termination of Career Executive Assignment
Department: Department of Corrections and Rehabilitation

WHISTLEBLOWER NOTICE OF FINDINGS

The Board will vote to grant or deny a petition for rehearing filed by one or both parties, regarding a Notice of Findings issued by the Executive Officer under Government Code, section 19682 et seq. and Title 2, California Code of Regulations, section 56 et seq.

NONE

F. PENDING BOARD REVIEW

These cases are pending preparation of transcripts, briefs, or the setting of oral argument before the Board.

- (1) **EDUARDO PEREZ, CASE NO. 05-0763A**
Appeal from five percent reduction in salary for six months
Classification: Parole Agent I (Adult Parole)
Department: Department of Corrections

Proposed decision rejected November 1, 2005
Pending transcript

20. NON-EVIDENTIARY CASES

A. WITHHOLD APPEALS

Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

WITHHOLD FROM CERTIFICATION
CASES HEARD BY A STAFF HEARING OFFICER

NONE

WITHHOLD FROM CERTIFICATION
CASES NOT HEARD BY A STAFF HEARING OFFICER

- (1) **MILTON AZEVEDO, CASE NO. 05-1496**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability and a negative employment record.

- (2) **CLARENCE CELESTINE, CASE NO. 04-1407**
Classification: California Youth Authority
Department: Youth Correctional Authority
Issue: Failed to appear at psychological examination and initial investigative interview.
- (3) **EDDIE ESPINOZA, CASE NO. 04-2634**
Classification: CHP Cadet
Department: California Highway Patrol
Issue: Suitability; omitted pertinent information and negative law enforcement contact.
- (4) **LAWRENCE GARMON, CASE NO. 05-0406**
Classification: Medical Technical Assistant
Department: Corrections
Issue: Suitability and firearm prohibition.
- (5) **FARRIS HISLE, CASE NO. 05-0815**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; negative driving and negative law enforcement contacts and negative military record.
- (6) **JENNIFER JONES, CASE NO. 05-0676**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitting pertinent information and illegal drug possession.
- (7) **DANIEL JUAREZ, CASE NO. 05-0949**
Classification: Correctional Officer
Department: Corrections
Issue: Suitability; omitted pertinent information, negative military, employment and law enforcement contacts and arrest and conviction record.
- (8) **CORNELL REED, CASE NO. 04-2433**
Classification: Motor Vehicle Field Representative
Department: Motor Vehicles
Issue: Conviction involving moral turpitude and suitability.
- (9) **LA NOLA SMITH, CASE NO. 04-1997**
Classification: Motor Vehicle Field Representative
Department: Motor Vehicles
Issue: Moral turpitude.

(10) SHANNON SOVICK, CASE NO. 04-2530

Classification: CHP Cadet

Department: California Highway Patrol

Issue: Suitability and a negative employment record.

(11) JOHN VARNI, CASE NO. 05-1914

Classification: CHP Cadet

Department: California Highway Patrol

Issue: Suitability; negative employment record as a peace officer.

B. MEDICAL AND PSYCHOLOGICAL SCREENING APPEALS

Cases heard by a Staff Hearing Panel comprised of a managerial staff member of the State Personnel Board and a medical professional. The Board will be presented recommendations by a Hearing Panel on each appeal.

NONE

**C. EXAMINATION APPEALS
MINIMUM QUALIFICATIONS
MERIT ISSUE COMPLAINTS**

Cases heard by a Staff Hearing Officer, a managerial staff member of the State Personnel Board or investigated by Appeals Division staff. The Board will be presented recommendations by a Staff Hearing Officer or Appeals Division staff for final decision on each appeal.

EXAMINATION APPEALS

NONE

MINIMUM QUALIFICATIONS

NONE

MERIT ISSUE COMPLAINTS

NONE

D. RULE 211 APPEALS
RULE 212 OUT OF CLASS APPEALS
VOIDED APPOINTMENT APPEALS

Cases heard by a Staff Hearing Officer, or a managerial staff member of the State Personnel Board. The Board will be presented recommendations by a Staff Hearing Officer for final decision on each appeal.

NONE

E. REQUEST TO FILE CHARGES CASES

Investigated by Appeals Division staff. The Board will be presented recommendations by Appeals Division staff for final decision on each request.

- (1) **ARVIND BALU, CASE NO. 04-2177**
Classification: Civilly committed offender at ASH
Department: Mental Health
Issue: The charging party requests charges be filed against the charged parties for violations of various subsections of Government Code section 19572.
- (2) **STAR MOFFATT, CASE NO. 04-2755**
Classification: Member of the Public
Department: Alcohol and Drug Programs
Issue: The charging party requests charges be filed against the charged parties for violations of various subsections of Government Code section 19572.

PETITIONS FOR REHEARING CASES

NONE

SUBMITTED

1. TEACHER STATE HOSPITAL (SEVERELY), ETC.

Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002.)

2. VOCATIONAL INSTRUCTOR (SAFETY)(VARIOUS SPECIALTIES)

Departments of Mental Health and Developmental Services. (Hearing held December 3, 2002.)

3. TELEVISION SPECIALIST (SAFETY)

The Department of Corrections proposes to establish the new classification Television Specialist (Safety) by using the existing Television Specialist class specification and adding "Safety" as a parenthetical to recognize the public aspect of their job, additional language will be added to the Typical Tasks section of the class specification and a Special Physical Characteristics section will be added. (Presented to Board March 4, 2003.)

4. HEARING – Personal Services Contract #04-03

Appeal of the California State Employees Association from the Executive Officer's April 15, 2004, Approval of Master Contracts between the California Department of Corrections and Staffing Solutions, CliniStaff, Inc., Staff USA, Inc., CareerStaff Unlimited, MSI International, Inc., Access Medical Staffing & Service, Drug Consultants, Infinity Quality Services Corporation, Licensed Medical Staffing, Inc., Morgan Management Services, Inc., Asereth Medical Services, and PrideStaff dba Rx Relief. (Hearing held August 12, 2004.)

5. HEARING

Proposed new and revised State Personnel Board Regulations effecting equal opportunity, discrimination complaints and reasonable accommodation policies and procedures. (Hearing held July 7, 2004.)

6. HEARING – PERSONAL SERVICES CONTRACT # 05-07

Appeal of Department of General Services (DGS) from the Executive Officer's April 22, 2005 Disapproval of a Proposed Three-Year Cost-Savings Contract with American Building Maintenance janitorial Services for Custodial Services for the Franchise Tax Board. (Hearing held August 9, 2005)

7. MARK SAMORA, CASE NO. 04-3041A

Appeal from dismissal. Information Technology Consultant. California State University, Los Angeles. (Oral Argument held October 3, 2005)

8. HEARING – PERSONAL SERVICES CONTRACT #05-04

Appeal of the California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (CASE) from the Executive Officer's April 1, 2005 Approval of a Contract for Legal Services between the Secretary of State's Office and Renne & Holtzman Public Law Group, LLP (Oral Argument held on October 3, 2005)

9. HEARING

Proposed Revisions to Whistleblower Retaliation Complaint Regulations (Title 2, C.C.R., section 56 et. seq.) (Hearings held on September 20, 2005 and October 3, 2005)

10. HEARING

Proposed Revisions to Discovery Regulations in Evidentiary Hearings Regulations (Title 2, C.C.R., section 57 et. seq.) (Hearings held on September 20, 2005 and October 3, 2005)

11. PATRICK BRASS, CASE NO. 04-1952A.

Appeal from dismissal. Youth Correctional Counselor. Department of the Youth Authority. (Oral Argument heard November 1, 2005)

12. GARY GARFINKLE, CASE NO. 98-3128RBA.

Appeal for determination of back salary, benefits and interest. Deputy Attorney General IV. Department of Justice. (Oral Argument heard November 1, 2005)

NOTICE OF GOVERNMENT CODE SECTION 18671.1 RESOLUTION

Since Government Code section 18671.1 requires that cases pending before State Personnel Board Administrative Law Judges (ALJ's) be completed within six months or no later than 90 days after submission of a case, whichever is first, absent the publication of substantial reasons for needing an additional 45 days, the Board hereby publishes its substantial reasons for the need for the 45-day extension for some of the cases now pending before it for decision.

An additional 45 days may be required in cases that require multiple days of hearings, that have been delayed by unusual circumstances, or that involve any delay generated by either party (including, but not limited to, submission of written briefs, requests for settlement conferences, continuances, discovery disputes, pre-hearing motions). In such cases, six months may be inadequate for the ALJ to hear the entire case, prepare a proposed decision containing the detailed factual and legal analysis required by law, and for the State Personnel Board to review the decision and adopt, modify or reject the proposed decision within the time limitations of the statute.

Therefore, at its next meeting, the Board will issue the attached resolution extending the time limitation by 45 days for all cases that meet the above criteria, and that have been before the Board for less than six months as of the date of the Board meeting.

GOVERNMENT CODE SECTION 18671.1 RESOLUTION

WHEREAS, Section 18671.1 provides that, absent waiver by the appellant, the time period in which the Board must render its decision on a petition pending before it shall not exceed six months from the date the petition was filed or 90 days from the date of submission; and

WHEREAS, Section 18671.1 also provides for an extension of the time limitations by 45 additional days if the Board publishes substantial reasons for the need for the extension in its calendar prior to the conclusion of the six-month period; and

WHEREAS, the Agenda for the instant Board meeting included an item titled "Notice of Government Code section 18671.1 Resolution" which sets forth substantial reasons for utilizing that 45-day extension to extend the time to decide particular cases pending before the Board;

WHEREAS, there are currently pending before the Board cases that have required multiple days of hearing and/or that have been delayed by unusual circumstances or by acts or omissions of the parties themselves;

NOW, THEREFORE, BE IT RESOLVED AND ORDERED that the time limitations set forth in Government Code section 18671.1 are hereby extended an additional 45 days for all cases that have required multiple days of hearing or that have been delayed by acts or omissions of the parties or by unusual circumstances and that have been pending before the Board for less than six months as of the date this resolution is adopted.

* * * * *



1

(Cal. 12/06/05;)

TO: Members
State Personnel Board

FROM: State Personnel Board - Legislative Office

SUBJECT: LEGISLATION

There is no written legislative report at this time. I will give a verbal presentation on any legislative action that has taken place that will be of interest to the Board.

Please contact me directly should you have any questions or comments regarding any bills that you may have an interest in. I can be reached at (916) 653-0453.


Sherry Hicks
Director of Legislation

Attachment

TO: STATE PERSONNEL BOARD

FROM: BRUCE MONFROSS, Senior Staff Counsel
Chief Counsel's Office

REVIEWED BY: ELISE ROSE, Chief Counsel
Chief Counsel's Office

SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 56
THROUGH 56.8 - WHISTLEBLOWER COMPLAINT
PROCEDURES REGULATIONS

REASON FOR HEARING AND BACKGROUND:

State Personnel Board (SPB) staff proposes modifications to the Whistleblower Complaint Procedures regulations, which were originally proposed in a NOTICE OF PROPOSED REGULATIONS AND STATEMENT OF REASONS dated July 8, 2005 (attached) and the subject of public hearings conducted on August 30 and October 3, 2005. The full text and a discussion of the proposed changes being recommended are attached.

Comments received at the hearings and in-writing during the 45-day comment period ending August 22, 2005, have been given full consideration. Responses to comments received are attached. The proposed modifications were made available to interested parties in the attached NOTICE OF MODIFICATION OF PROPOSED REGULATIONS AND PUBLIC HEARING dated November 11, 2005.

Copies of the final text of these rules without strikeout and underline will be made available to the five-member State Personnel Board (Board) and public at the time of hearing.

REGULATORY SUMMARY:

Based upon a review and analysis of all comments received, staff recommends that clarifying changes be made to the proposed regulations, as summarized in Attachment A.

RECOMMENDATION:

It is recommended that the Board adopt the proposed amendments to Title 2, California Code of Regulations §§ 56 through 56.8, as shown in the current calendar.

ATTACHMENT INDEX

NOTICE OF PROPOSED MODIFICATIONS OF REGULATIONS AND PUBLIC
HEARING dated November 11, 2005 and PROPOSED TEXT OF THE AMENDED
REGULATION

A: Comments – Whistleblower Retaliation Complaint Regulation - Page 22



**NOTICE OF MODIFICATIONS OF PROPOSED REGULATIONS
AND PUBLIC HEARING**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: November 11, 2005

**TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET**

**SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 56 THROUGH
56.8 - WHISTLEBLOWER COMPLAINT PROCEDURES
REGULATIONS**

Under the authority established in Government Code (GC) § 18701, and pursuant to GC § 11346.8(c), the State Personnel Board (SPB) is providing notice of changes that are being considered concerning the above-named regulations, which were the subject of public hearings held in August and October 2005. As a result of written comments and oral testimony received, parts of the regulations have been modified from what was originally made available. Please take notice that a public hearing regarding the modifications to the original proposed regulations made available is scheduled for:

Date and Time: December 6, 2005 - 9:30 a.m. to 10:00 a.m.

Place: 455 Golden Gate Avenue, Benicia Room
San Francisco, CA 94102

Purpose: To receive comments about this action.

A copy of the full text of the regulations as originally proposed and the modifications are attached. SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m. at 801 Capitol Mall, Room 555, Sacramento, CA 95814.

Modifications to Whistleblower Retaliation Complaint Regulations
November 11, 2005
Page Two

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close on Monday, November 28, 2005 at 5:00 p.m. Any person may submit written comments about the proposed modifications. To be considered by SPB, written comments must be received by Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During this comment period, written comments may also be e-mailed to Bruce Monfross at [**bmonfross@spb.ca.gov**](mailto:bmonfross@spb.ca.gov) or faxed to (916) 653-4256.

Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross at (916) 653-1403. Questions regarding the regulatory process in conjunction with these regulations may be directed to Elizabeth Montoya, the backup contact person, at (916) 654-0842 or TDD (916) 653-1498.

A handwritten signature in black ink, appearing to read "Laura M. Aguilera". The signature is fluid and cursive, with a large loop at the end.

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulations

REGULATIONS GOVERNING WHISTLEBLOWER RETALIATION COMPLAINTS

Changes to the original text are illustrated in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikethrough using a “-“, and additions to the language originally proposed are double underlined and *italicized*.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations

ARTICLE 4. Hearings and Appeals

§ 56. Whistleblower Retaliation Complaint Process.

(a) Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or Education Code Section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), or Education Code Section 87162(b), may file a complaint and/or appeal with the ~~Board~~ State Personnel Board in accordance with the provisions set forth in Sections 56.1 - 56.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

(b) For purposes of Sections 56 – 56.8, the term “Board” is defined as the five-member State Personnel Board, as appointed by the Governor. The term “Executive Officer” is defined as the Executive Officer of the State Personnel Board, as appointed by the Board. The State Personnel Board shall hereinafter be referred to as the SPB.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87162, 87164, Education Code; and Sections 8547.2, 8547.8, and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the ~~Appeals Division of the~~ State Personnel Board.

An individual desiring to file a complaint of retaliation with the ~~Board~~ SPB must adhere to the following requirements:

(a) Prior to filing his or her complaint with the ~~Board~~ SPB, the complainant shall comply with all other filing requirements, if applicable, set forth in Government Code Section 19683.

(b) The complaint shall be filed with and received by the Appeals Division SPB within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and attachments for the Appeals Division SPB to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(c) All complaints shall be in writing.

(d) Each complaint shall:

(1) ~~identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the improper personnel action, as defined in Government Code Section 8547.3(b), or Education Code Section 87163(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the improper employment action occurred; and all information that the complainant possesses that shows that the improper employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;~~

(A) ~~For purposes of this section, "improper personnel action" includes, but is not limited to, promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action; as well as intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command the complainant, for the purpose of interfering with the complainant's rights conferred pursuant to applicable statutes.~~

(2) ~~include as attachments all non-privileged documents, records, declarations and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation;~~

(3) ~~include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint;~~

(4) ~~identify all respondents known to the complainant (i.e., the appointing power as well as all state civil service or community college employees alleged to have retaliated against the complainant), and identify the business address of each respondent named as a party to the complaint;~~

~~(5) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the complainant after the complaint has been filed with the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response;~~

~~(6) specify the relief and/or remedies sought, including any compensatory damages sought;~~

~~(7) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto. If the material facts alleged are not within the personal knowledge of the complainant, the complaining party may be required to present supporting affidavits from persons having actual knowledge of the facts before acting upon the request for adverse action. Any failure to comply with the provisions of this section shall constitute a waiver on the part of the complainant to subsequently seek disciplinary action against any individually named respondent;~~

~~(8) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true; and~~

~~(9) be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.~~

(d) Each complaint shall clearly identify the protected activity engaged in by the complainant, the specific act(s) of reprisal or retaliation alleged to have occurred, and the names and business address of the individual(s) and entities alleged to have committed the retaliatory act(s). Each complaint shall specify the relief and/or remedies sought against each entity or individual, including any compensatory damages sought.

~~(e) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Section 19575, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, or when appealing a notice of non-punitive action, pursuant to Government Code Section 19585.~~

(e) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(f) Each complaint shall include a sworn statement, under penalty of perjury, that the contents of the written complaint are true and correct.

(g) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.

(h) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code Section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code Sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other Board SPB hearing, unless that party has first complied with all filing requirements set forth in Section 56.1.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2; and Section 6129, Penal Code.

§ 56.2. Acceptance of Whistleblower Complaint; ~~Notice; Findings of the Executive Officer.~~

(a) Within 10 working days of receipt of the complaint, the Appeals Division ~~Board~~ SPB shall initiate an investigation to determine if whether the Board it has jurisdiction over the complaint and to determine if whether the complainant meets the filing requirements set forth in Section 56.1. The Appeals Division ~~Board~~ SPB shall also determine if whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547-8547.12 and 19683 and/or Education Code Sections 87160-87164; and Section 56.1 of these regulations.

(b) If the Appeals Division ~~Board~~ SPB determines that all filing requirements have not been satisfied the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall ~~may thereafter~~ be permitted to file an amended complaint within ~~15~~ 10 working days of receipt service of the notice of non-acceptance of the complaint.

(c) Within 10 working days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has

~~jurisdiction over the amended complaint, and to determine if the amended complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied, it shall notify the complaining party in writing that the amended complaint has been rejected and the reason(s) for that determination.~~

~~(d) If the Appeals Division accepts the complaint, it shall notify the complaining party in writing that the complaint has been accepted, and shall serve a copy of the complaint or amended complaint on all respondents named in the complaint. Service of the complaint or amended complaint on the appointing power may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of the executive in charge of the Department, Agency, District or Board, and/or to the Legal Office of the appointing power. Service of the complaint or amended complaint on the individually named respondents may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of each individually named respondent.~~

~~(e) Within 20 working days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include specific and detailed factual information that refutes the complainant's allegations, and shall include all non-privileged documents, records, declarations and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a Proof of Service. Service of the response may be accomplished by mailing a copy of the reply to both the Appeals Division and the home or business address of the complaining party. Each written response shall be limited to no more than 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The respondent shall submit a separate document with the response stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.~~

~~(f) If the complainant desires to file a written reply to the written response(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within 10 working days after service of the response(s) of the named respondent(s). Service of the reply may be accomplished by mailing a copy of the reply to the Appeals Division and the business address of each named respondent, with proof of service attached. Each written reply shall be limited to no more than 10 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the reply stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause. The~~

~~Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60 working day requirement for the issuance of a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.~~

~~(g) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government Code Sections 8547-8547.12 and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint. For purposes of this section, the phrase "party to the complaint" is limited to the complaining party and/or any respondent named in the complaint.~~

~~(h) In those instances where any party to the complaint requests, pursuant to this Section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:~~

~~(1) Within 5 working days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit a request for review of the issue in writing to the State Personnel Board Chief Administrative Law Judge for resolution. The party submitting the matter to the Chief Administrative Law Judge shall, on that same day, notify the non-moving party, both telephonically and in writing, that the matter has been submitted for review by the Chief Administrative Law Judge;~~

~~(2) The requesting party and the appointing power and/or other named respondent shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within 5 working days of the date that notice of the dispute is first submitted to the Chief Administrative Law Judge;~~

~~(3) Except as set forth in subsection (4) of this subdivision, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee;~~

~~(4) In those cases where the appointing power and/or other named respondent declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper;~~

~~(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within 5 working days of receipt of the parties written briefs;~~

~~(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision;~~

~~(7) The 60 working day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.~~

~~(i) Within 60 working days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on complainant and each named respondent a Notice of Findings concerning the complaint of retaliation, unless the 60 working day period has been waived or tolled under subsection (f) or (h) of this section.~~

~~(j) In those cases where the Executive Officer concludes that the complainant failed to prove the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall, except in those instances where the findings address jurisdictional and/or procedural matters, specifically address each allegation contained within the complaint.~~

~~(k) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. The Notice of Findings shall also, except in those instances where the findings address jurisdictional and/or procedural matters, specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any individual manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.~~

~~(l) In those cases where the Executive Officer concludes that material questions of fact exist concerning whether the complainant established retaliation for having engaged in whistleblowing activities, the Executive Officer may, in his or her sole discretion, assign the case to an evidentiary hearing before a Board Administrative Law Judge.~~

~~(m) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and/or 56.4. However, in those cases where the Executive Officer issues a Notice of Findings assigning the matter to an evidentiary hearing pursuant to the provisions of subdivision (l), no party to the complaint shall be entitled to file either a Petition for Hearing before the Board, nor a Petition for Order of Remedies.~~

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 working days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

~~(2) refer the case for investigation and/or an investigative hearing in accordance with the provisions of Section 56.3; or~~

~~(3) schedule the case for an informal hearing before an administrative law judge, in accordance with the provisions of Section 56.34.~~

~~(d) In accordance with the provisions of Penal Code Section 6129, the SPB shall be entitled to defer review of a complaint filed by an employee of the Department of Corrections and Rehabilitation in those cases where the employee has filed a similar complaint with the Office of the Inspector General.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 56.3. ~~Petition for Hearing by Complainant Before the Board. Cases Referred to Investigation or Investigative Hearing.~~

~~(a) If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Hearing before the Board.~~

~~(b) A Petition for Hearing under this section must be filed with the Executive Officer and served on each named respondent(s) to the complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with a proof of service attached, to the business address of each named party to the complaint.~~

~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~

~~(d) Each respondent named in the complaint shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board and served on the complainant no later than 20 days after the date the Petition for Hearing was served on the respondent.~~

~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.3(c), and whether the Notice of Findings is supported by substantial evidence.~~

~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~

~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assign the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board~~

evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as an attachment or exhibit to the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

(a) If the Executive Officer assigns a complaint for investigation or an investigative hearing, the Executive Officer or the assigned investigator(s) shall conduct the investigation and/or investigative hearing in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators, pursuant to the provisions of Government Code Section 18671, shall have authority to take depositions, issue subpoenas, order the production of documents, and take any other action administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure, in order to ensure a fair and expeditious investigation and/or investigative hearing. The 60 working day period governing the issuance of the Notice of Findings set forth in Section 56.5(a) shall be tolled for any period of non-compliance by any party to the investigation or investigative hearing.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation or investigative hearing, in accordance with the provisions of Section 56.5.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; and Section 6129, Penal Code, and Section 2016 et seq., Civil Procedure Code.

§ 56.4. Petition for Hearing by Respondents Before the Board. Cases Referred to Informal Hearing Before an ALJ.

~~(a) Any named respondent found in the Notice of Findings to have engaged in retaliatory conduct may file a Petition for Hearing before the Board, contesting the findings of fact and conclusions regarding the legal causes for discipline and/or the penalty to be imposed.~~

~~(b) A Petition for Hearing must be filed with the Executive Officer and served on each named party to the initial complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with proof of service attached, to the home or business address of each named party to the complaint.~~

~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~

~~(d) The complainant shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board no later than 20 days after the date the Petition for Hearing was served on the complainant.~~

~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.4(c), and whether the Notice of Findings is supported by substantial evidence.~~

~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~

~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.~~

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as part of the written pleadings during the Notice of~~

~~Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

~~(j) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.~~

(a) For those complaints assigned to an informal hearing before an administrative law judge, the Board *SPB* shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 *calendar* days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

(1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named respondent to serve on the complainant and file with the Board *SPB*, at least 10 *calendar* days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code Section 11445.10 *et seq.*, and may in the discretion of the administrative law judge, include such supplemental proceedings, informal or formal, as ordered by the administrative law judge, *and as permitted by Section 11445.10 et seq.*, to ensure that the case is heard in a fair and expeditious manner. The administrative law judge shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the administrative law judge. *All parties shall, upon request and payment of applicable reproduction costs, be provided with a transcript or a copy of the recording of the informal hearing.*

(c) Following the informal hearing and any supplemental proceedings, the administrative law judge shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the administrative law judge's findings and recommended remedies in their entirety;

modify the administrative law judge's findings and recommended remedies; or reject the administrative law judge's findings and recommended remedies, and:

- (1) issue independent findings after reviewing the complete record; or
- (2) remand the case back to the administrative law judge for further proceedings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, and Penal Code.

§ 56.5. Decision Adopting the Notice of Findings. Findings of the Executive Officer.

~~If no Petition for Hearing is received pursuant to the provisions of Section 56.3 or 56.4, the Notice of Findings shall be deemed to be the Board's final Decision in the matter, and no named party to the action shall be deemed to have any right of further appeal to the Board.~~

(a) The Executive Officer shall issue a Notice of Findings within 60 working days of the date the Board *SPB* accepts the complaint *pursuant to Section 56.2(c)*, unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled or waived.

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant is free to *may* file a civil complaint with the superior court pursuant to Government Code Section 8547.8(c).

(c) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall include the legal causes for disciplinary action under Government Code Section 19572 and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(d) The Notice of Findings shall inform any respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Board *SPB*, and served on all other parties within 30 *calendar* days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the ~~five-member~~ Board, or an evidentiary

hearing before an administrative law judge, regarding the findings of the Executive Officer. The hearing shall be conducted in accordance with the SPB's rules governing the conduct of evidentiary hearings. If a timely request for hearing is not filed with the Board SPB, the Notice of Findings shall be deemed the Board's final decision in the case.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, and 19582, 19590 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts.

(a) In those cases where the Board issues a final ~~D~~decision that finds that ~~any a~~ manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall ~~O~~order the appointing authority to place a copy of the Board's ~~D~~decision in that individual's Official Personnel File. ~~The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 calendar days of the issuance of the Board's Oorder and shall to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 calendar days of the issuance of the Board's Oorder, notify the Board that it has complied with the provisions of this subdivision.~~

(1) In accordance with the provisions of Penal Code Section 6129, subsection (c)(3), any employee of the Department of Corrections and Rehabilitation found to have engaged in retaliatory acts shall be disciplined by, at a minimum, a suspension without pay for 30 calendar days, unless the Board determines that a lesser penalty is warranted. In those instances where the Board determines that a lesser penalty is warranted, the decision shall specify the reasons for that determination.

(b) In those cases where the Board issues a final ~~D~~decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall ~~O~~order the appointing authority to place a copy of the Board's ~~D~~decision in that individual's ~~Official Personnel record~~ File. ~~The appointing authority shall place the Decision in the individual's Official Personnel File within 30 calendar days of the issuance of the Board's Oorder and shall to also, within 40 calendar days of the issuance of the Board's Oorder, notify the Board that it has complied with the provisions of this subdivision.~~

(c) Any ~~D~~decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

(1) a request for hearing pursuant to Section 56.5(ed) has not been timely filed with the Board; or

(2) 30 *calendar* days has elapsed from the date that the ~~five-member~~ Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or

(3) a decision has been issued by the ~~five-member~~ Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592, and 19683, Government Code; and Section 6129, Penal Code.

§ 56.7. Consolidation with Other Hearings.

(a) The SPB or the assigned administrative law judge shall possess the requisite discretion to direct that separate, reasonably related cases be consolidated into a single hearing. Whenever two or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date, if the discovery provisions set forth in Section 57 et seq. are negatively impacted by the consolidation.

(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

(ac) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of Section 56.1(~~d~~)(7) (d) and (e), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named respondent;

(3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) to present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

~~(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

§ 56.8. Discovery, Evidentiary Hearing Procedures and Representation by the Executive Officer.

~~The discovery provisions set forth in Section 57-57.4 shall apply to this section.~~

~~NOTE: Authority cited: Section 18701, Government Code.~~

~~Reference: Section 87164, Education Code; Sections 8547.8, 18671, 18672, 18672.1, 18673, 18675 and 19683, Government Code.~~

(a) The hearing conducted pursuant to Section 56.5(d), shall be conducted in accordance with the Board's SPB's rules of practice and procedure for the conduct of hearings before the five-member Board, or evidentiary hearings before an administrative law judge. Any proposed decision issued by an administrative law judge after an evidentiary hearing shall be subject to review by the five-member Board.

(b) The administrative law judge assigned to conduct the evidentiary hearing shall not be the same administrative law judge who conducted the informal investigative hearing in the case, unless all parties to the action request, in writing, that the same administrative law judge be assigned to conduct the evidentiary hearing.

(c) The discovery procedures set forth in Section 57 et seq., shall be applicable to those evidentiary hearings conducted pursuant to this sSection.

(d) The Executive Officer, or his or her designee, shall have the authority, in his or her discretion, to prosecute the complaint *and present evidence regarding his or her findings* during a hearing before the ~~five-member~~ Board, and/or during an evidentiary hearing before an administrative law judge. The Executive Officer, or his or her designee, shall have the discretion to present the case in the manner he or she deems to be appropriate, including, but not limited to, the issues to be presented, the evidence to be presented, and the witnesses, if any, to be questioned.

(1) The complaining party shall be permitted to ~~also~~ be represented by a representative of his or her own choosing during any hearing before either the ~~five-member~~ Board, and/or an administrative law judge, and shall be permitted to raise *relevant* issues, present *relevant* evidence, and question witnesses *regarding relevant matters* during those hearings where witness testimony is permitted.

(2) In those cases where the Executive Officer, or his or her designee prosecutes a case during an evidentiary hearing before an administrative law judge, the case shall be assigned to an administrative law judge from the Office of Administrative Hearings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-1-

A. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION1. Conflicts of Interest

- (a) No criteria set forth for the Executive Officer to follow when deciding whether to schedule investigation or informal hearing.

Response: That decision shall be left solely to the Executive Officer's discretion.

- (b) No criteria set forth for the ALJ to follow when deciding to transform an informal hearing to a formal evidentiary hearing.

Response: The reference to formal proceedings in Section 56.4 has been eliminated.

- (c) What preclusive effect will a Notice of Findings have in any future proceedings?

Response: If certain allegations and/or request for relief have been dismissed by the Notice of Findings, and the case is subsequently scheduled for an evidentiary hearing before an ALJ, the complainant can file a pre-hearing motion requesting that the ALJ reinstate those allegations and/or requests for relief. All other findings of fact and conclusions of law reached in the Notice of Findings shall not be binding in any subsequent evidentiary hearing.

- (d) Allowing complainant to be represented by his/her own attorney, in addition to the Executive Officer, gives complainant's "two bites at the apple" and violates a respondent's due process rights. The Department of Fair Employment and Housing (DFEH) does not allow for such dual representation.

Response: The Fair Employment and Housing Commission (FEHC) does, in fact, permit such dual representation when the DFEH is prosecuting a discrimination complaint before the FEHC, particularly as the complainant may wish to address relevant issues that the DFEH declines to address. Nor does it constitute "two bites at the apple," as only one hearing is conducted.

2. Assessment Regarding the Effect on Jobs/Businesses

- (a) State agencies may have to expand their legal offices if the Executive Officer starts prosecuting whistleblower retaliation complaint cases.

Response: Because it is anticipated that the Executive Officer will prosecute no more than a few cases each year (due to resource restraints), it is highly doubtful that state agencies will have to expand their legal offices to deal with such a minor increase in cases.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-2-

- (b) The SPB will have to hire additional legal staff to handle initial analysis.

Response: That is incorrect, as it is not anticipated that the SPB will receive a substantially larger volume of whistleblower retaliation complaints as a result of the proposed regulatory changes.

- (c) SPB ALJ's will not be able to handle the additional work load.

Response: If the workload becomes too burdensome, a budgetary augmentation will be requested.

3. Statement of Reasons

- (a) The process will become more burdensome, not less, as ALJ's shift from informal to formal hearings.

Response: The reference to formal hearings in Section 56.4 has been eliminated.

- (b) SBP should consider implementing a filing fee, approximately \$100, for cases filed with the SPB to help defray the SPB's costs.

Response: No statutory authority exists that authorizes the SPB to implement a filing fee.

4. § 56.2. Acceptance of Whistleblower Complaint.

- Subsection (a). Changes the entity that will have the authority to determine the Board's jurisdiction from the Appeals Division to the Board itself. Will the Board now be taking formal action at its bi-monthly meetings to accept the complaints?

Response: A clarification has been made to indicate that the SPB, not the five-member Board, will review the complaint to determine if jurisdiction exists.

- Subsection (b). No specific time period for the Board to accept or reject a complaint.

Response: Section 56.2(c) addresses the issue.

- Who will send out the notification letter? If it is the Executive Officer, that creates a conflict of interest, if h/she later decides to prosecute the action.

Response: The regulations specify that the Executive Officer will send out the notification letter. The Executive Officer's action will not create a conflict of interest, as

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-3-

such actions do not constitute findings regarding the relative merits of the complaint. Nor has the Department explained how a conflict of interest is created if the Executive Officer subsequently decides to prosecute the action.

- If the Board permits an amended complaint to be filed, the statement of reasons requirement constitutes the Board providing legal advice so that a complainant can “clean up” a complaint. Also, no criteria exists for determining whether an amended complaint will be permitted. Also, if the Executive Officer makes the determination, that creates a conflict of interest if the Executive Officer subsequently prosecutes the case.

Response: The “statement of reasons” for not accepting the original complaint reflects existing practice, and does not constitute providing legal advice to a complainant, as it merely informs the complainant as to why the complaint is deficient. Amended complaints will be permitted except in those instances where the complainant is not either a state civil service employee (or applicant for state civil service employment) or a community college employee (or applicant for community college employment), or where the alleged disclosures or actions engaged in by the complainant clearly do not constitute “protected activity” under either the Government Code or the Education Code. The Executive Officer will not be the person making the determination as to whether an amended complaint will be permitted.

- Subsection (c). It is not clear whether the Board has ten working days from the date an amended complaint is submitted to determine whether to accept or reject the complaint.

Response: The subsection specifies that the Executive Officer shall, within 10 working days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either accept or reject the complaint.

5. §56.3. Cases Referred to Investigation or Investigative Hearing.

- Who makes the determination as to whether state employees are fully cooperating with the Executive Officer’s investigation, and who ensures that all participants’ due process rights are protected?

Response: The Executive Officer makes the ultimate determination as to whether an employee is cooperating with the investigation. If an employee believes his/her due process rights are being violated, the employee or his/her representative can raise an appropriate objection. (See Gov’t Code § 18672.1.)

- No time period is stated for complying with an investigator’s subpoena.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-4-

Response: The time period for complying with a subpoena shall be the same as for any other subpoena issued by the SPB. (See Gov't Code § 18672.)

- Who represents the state employee whose deposition is taken? (Very difficult position for the Department to initially represent the employee at a deposition, and then subsequently discipline the employee if the investigation determines that the employee engaged in misconduct.)

Response: That is for the employee and/or the appointing power to decide. As a practical matter, this provision should prove to be no more problematic than when the Department of Fair Employment and Housing interviews/deposes employees as part of an investigation that entity is conducting.

- What criteria will be utilized to determine whether the complaint is assigned to investigation by the Executive Officer, or informal hearing by an ALJ?

Response: That decision shall be left to the sole discretion of the Executive Officer.

- Who determines what entities/persons are designated as parties to the action, if not designated in the complaint?

Response: The complaint itself will govern who has been designated as a party to the complaint.

- No standards exist for determining whether a party is cooperating with the investigation.

Response: The same type of assessment that a department makes when making a good faith determination as to whether an employee is cooperating with an internal investigation being conducted by the department will be utilized by the Executive Officer.

- What role does the appointing power's attorney play in the investigative process? (May they instruct employees not to answer questions, may they cross-examine witnesses, may they present their own witnesses?)

Response: The SPB cannot prohibit a legal representative from instructing his/her client from answering a question during an investigation. What role the appointing power's attorney plays is ultimately up to the appointing power, but the attorney shall not be permitted to control an investigation, nor shall the attorney be permitted to cross-examine witnesses during an investigation or present their own witnesses for examination by the investigator, unless the investigator permits such actions to occur.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-5-

- How is the Board authorized to toll a statutory time frame by regulation?

Response: The provision permitting the Executive Officer to toll the 60-working days period for issuing a Notice of Findings has been eliminated.

- Is the investigation going to constitute public information?

Response: The investigative file will be subject to public disclosure to the extent required under the Public Records Act (Gov't Code § 6250 *et seq.*).

- How will the Board protect peace officer personnel information?

Response: The SPB will protect peace officer personnel information in the same manner that it currently protects such information that it obtains during the course of hearings that it conducts.

- Subsection (b). There is no provision for the respondents to provide a written response to the investigative findings.

Response: A written response is not necessary, because if the Notice of Findings concludes that a respondent has engaged in retaliatory conduct, the respondent shall be afforded an opportunity to refute those findings during the course of an evidentiary hearing before an administrative law judge. (See §§ 56.5(d), 56.8.)

6. § 56.4. Cases Referred to Informal Hearing Before an ALJ.

- Subsection (a). Is the requirement that respondents file a written response 10 days prior to the hearing ten calendar days or ten working days, since the regulations refer to both, or ten business days? (Some employees, working days also occur on the weekends)

Response: The regulations now specify either calendar days or working days. Because Government Code section 19683 specifies working days, as opposed to business days, these regulations will utilize similar language.

- What happens if an employee is on vacation during the notice period? There is no provision to extend time under such circumstances.

Response: To the extent an employee is unavailable to provide a response during the specified response period, s/he can subsequently request an extension of time to file his/her response to the ALJ on those grounds. Unlike a court that can postpone a hearing for a lengthy period of time to accommodate such issues, here Government Code section 19683 requires that the Executive Officer issue a Notice of Findings within

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-6-

60 working days of the date of acceptance of the complaint. Therefore, any such time extension will have to be made in concert with that limitations period.

- Is the written response to include attachments?

Response: The regulation neither mandates nor prohibits respondents from including attachments to the response.

- Does a legal representative have to sign the response under penalty of perjury?

Response: The regulation requires that the respondents, not the legal representative, sign the response under penalty of perjury.

- Will the complainant be afforded an opportunity to file a reply brief?

Response: The regulations do not contemplate that reply briefs will be permitted.

- Potential conflicts exist if the appointing power provides legal representation to the individual respondents, and later determines that disciplinary action should be taken against one or more of them.

Response: That issue should prove to be no more problematic than those situations where the appointing power provides legal representation to one or more of its employees during the course of an investigation conducted by the Department of Fair Employment and Housing.

- Where will the informal hearing be conducted?

Response: Where the hearing will be conducted shall be determined on a case-by-case basis, as with all SPB hearings.

- Subsections (b) and (c). Will the parties have an opportunity to cross examine witnesses during the informal hearing?

Response: The informal hearing will be conducted in conformance with the requirements of Government Code section 11445.10 *et seq.*

- Will the witnesses be sworn-in?

Response: The informal hearing will be conducted in conformance with the requirements of Government Code section 11445.10 *et seq.*

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-7-

- If further proceedings are needed, what effect will that have on the 60 working days period?

Response: The Notice of Findings is required to be issued within 60 working days of the date of acceptance of the complaint.

- The provision that the proceedings shall be “recorded” does not specify whether the recording will consist of note taking or tape recording.

Response: Clarifying language has been added that provides that parties will be entitled to request either a copy of the transcript or a copy of the recording of the informal hearing.

- Subsection (d). No criteria exist for the Executive Officer’s decision to accept, reject, modify, or remand the ALJ’s proposed Notice of Findings.

Response: Because it is ultimately the Executive Officer’s decision, s/he shall have sole discretion as to whether to accept, reject, modify, or remand the proposed Notice of Findings issued by the ALJ.

- Since the Executive Officer is not a constitutional officer, is it not a denial of due process to permit the parties no recourse if they do not agree with the Executive Officer’s decision?

Response: The Executive Officer is, in fact, a Constitutional officer. (See Cal. Const., art. VII, § 3.)

7. § 56.5. Findings of the Executive Officer.

- Subsection (a). May both the complainant and the respondents waive the 60 working days time period?

Response: A clarification has been made to specify that only the complainant can waive the 60 working days limitation period for the issuance of a Notice of Findings.

- Subsection (b). The Notice of Findings should have some preclusive effect regarding the complainant’s right to file a subsequent complaint in the superior court.

Response: The court, not the SPB, is the appropriate entity to determine what preclusive effect, if any, the Notice of Findings shall have in a subsequent civil action.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-8-

- Subsection (c). Who will take the disciplinary action against the employee if the department provided legal representation to the employee during the hearing? (Creates conflicts of interest for the employer.)

Response: If, after a hearing is conducted pursuant to Section 56.8, a determination is made that an individually-named respondent engaged in retaliatory conduct, the five-member Board shall be the entity that assesses the appropriate discipline, and the appointing power shall be directed implement the Board's order in that regard.

- There is no provision for appeal rights if the respondents disagree with the Notice of Findings.

Response: Pursuant to Section 56.5(d) and Section 56.8, if the Notice of Findings concludes that a respondent engaged in retaliatory conduct, the respondent can request an evidentiary hearing before an ALJ to contest those findings.

- What constitutes a hearing for disciplinary purposes, and how is the Skelly issue dealt with?

Response: The pre-deprivation rights required by Skelly v. State Personnel Board (1975) 15 Cal.3d 194, are not applicable here, because no disciplinary action will be taken against an employee until either: (1) the employee has timely requested and received a full evidentiary hearing pursuant to Section 56.5(d) and 56.8, or (2) the employee fails to timely request a hearing, thereby waiving his/her right to appeal any disciplinary action recommended in the Notice of Findings.

- Possible inconsistent outcomes exist if the employee gets a second disciplinary hearing.

Response: The employee will not get a second disciplinary hearing, as the hearing that results from an appeal from the Notice of Findings will constitute the disciplinary hearing.

- Subsection (d). Same problems as in subsection (c), *supra*. "A major conflict exists with the Board passing on discipline recommended by the Executive Officer since the Board always opines that it is the entities' role to determine what is a just and proper penalty."

Response: See Response to subsection (c). In addition, a major conflict does not exist because Government Code section 19683 expressly grants the Executive Officer authority initiate disciplinary proceedings against an employee.

- "There is no 'right' to a hearing, since the Board has the discretion to order an evidentiary hearing before the Board itself or an ALJ.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-9-

Response: When read in its entirety, Government Code section 19683 clearly gives a respondent a right to an evidentiary hearing before an ALJ in those instances where the Notice of Findings would result in a materially adverse decision against the employee. In addition, constitutional due process requirements dictate that disciplinary action cannot be imposed on a state civil service employee without the employee being afforded a hearing.

- If another hearing is held, that will be the third or fourth hearing that will take place regarding one action.

Response: The only time a formal evidentiary hearing will be conducted is if, after an investigation or informal hearing has been conducted, a Notice of Findings is issued that concludes that a respondent engaged in retaliatory acts, and the respondent thereafter requests a formal evidentiary hearing. Therefore, at most, one informal hearing or investigation will be conducted, followed by one formal hearing.

8. § 56.6. Disciplinary Action for Proven Retaliatory Acts.

- Subsection (a). The concerns raised in Section 56.4(b) and Section 56.5(c) are applicable here.

Response: See Responses to Section 56.4(b) and Section 56.5(c).

- Subsection (c). The regulations are silent as to whether a state employee against whom disciplinary action has been taken has a right to file a petition for writ of mandate.

Response: The SPB cannot by regulation confer a right of judicial review on a party. That fact notwithstanding, any final decision issued by the Board is subject to judicial review pursuant to the provisions of Code of Civil Procedure sections 1094.5 or 1085.

- The rights of the respondents are never addressed in detail. If the complaint is filed only against the appointing power, how is the question of disciplinary action against an individual employee to be addressed?

Response: A clarification has been made to Section 56.5, subdivision (d), to specify that any hearing requested by an individual found to have engaged in retaliatory conduct shall be conducted in accordance with the SPB's rules governing the evidentiary hearing process. Those rules include the right to conduct discovery, to introduce evidence, and to examine and cross-examine witnesses. Individual respondents' rights are also addressed in Section 56.7. More importantly, constitutional due process mandates that no disciplinary action can be taken against an employee without that employee first being afforded an opportunity to refute the allegations made against him/her.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-10-

- What recourse does an individual employee have against a complainant when the complaint is dismissed at the Notice of Findings stage? (Can a respondent file a Request-to-File-Charges against the complainant?)

Response: Government Code section 19683.5 does not contain any exclusionary language that prohibits a respondent from filing a Request-to-File-Charges against an unsuccessful complainant. Under the appropriate circumstances, however, filing such charges may constitute impermissible retaliation pursuant to Government Code section 19702(h).

- Who will be monitoring the time frames in this section, and what is the consequence of missing the time frames?

Response: The five-member Board, or its designee, shall monitor the time frames. Government Code section 18710 sets forth the remedies for failure to comply with orders of the Board.

9. § 56.7. Consolidation with Other Hearings.

- Subsection (a). What standard(s) will the Board use when awarding damages?

Response: The Board will utilize those standards set forth in its precedential decision Andrew Ingersoll (2000) SPB Dec. No. 00-01, pp. 31-33, which follows the framework established by the Fair Employment and Housing Commission for awarding damages.

- Subsection (b). What criteria will the ALJ use when making such orders (i.e., separating respondents from hearings)?

Response: The criteria are set forth in the regulation (i.e., “the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.”).

10. § 56.8. Evidentiary Hearing Procedures and Representation by Executive Officer.

- Subsection (d). The Department will object to the Executive Officer prosecuting the case, if the Executive Officer also investigated.

Response: The Department has failed to establish good grounds for why the Executive Officer should not be permitted to prosecute the case if s/he also investigated the matter. That is no different from a department investigating alleged misconduct and

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-11-

then taking disciplinary action against an employee as the result of its investigative findings, or a District Attorney's office criminally prosecuting a case based on its own investigative findings.

- Even if an ALJ from the Office of Administrative Hearings conducts the hearing, the matter is still brought back to the Board for final review, thereby creating an inherent conflict because the Board will necessarily be asked to pass on the litigation skills of its own Executive Officer/staff.

Response: There is no inherent conflict. Case law makes clear that there is no conflict if the Board is the administrative agency charged with enforcing the statute at issue here. This state of affairs is analogous to those situations where the Board reviews a disciplinary action taken against an SPB employee by the Executive Officer, or when the Board reviews a decision of the Executive Officer issued pursuant to the Public Contracts Code (Gov't Code § 19130 *et seq.*). In neither situation has a conflict of interest ever been found to exist simply because the Executive Officer is an employee of the Board.

B. DEPARTMENT OF INDUSTRIAL RELATIONS

1. Informative Digest/Policy Statement Overview.

The proposed regulations provide no criteria upon which a discretionary decision should be based. The SPB should give guidance to its ALJs and inform parties when conversion might be warranted, and to provide ability to conduct discovery once converted to a formal evidentiary hearing.

Response: The reference to formal proceedings in Section 56.4 has been eliminated.

2. § 56.1. Requirements for Filing Whistleblower Retaliation Complaints.

- Subsection (b). Should "Appeals Division" be changed to "Board?"

Response: The requisite clarification has been made.

- Add: "Complainant shall simultaneously serve each respondent with the complaint and attachments. Otherwise, given the short response times, the ability of Respondents to investigate and formulate a meaningful response are significantly compromised."

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-12-

Response: The respondents will only be served with a copy of the complaint if a determination is made to accept the complaint, and the requested revision may lead to unnecessary conflict in the workplace. Because the 60 working days limitation period does not commence until after the complaint is accepted, the requested revision will not provide the respondents any greater amount of time in which to file a response.

3. § 56.2. Acceptance of Whistleblower Retaliation Complaint.

- Subsection (a). Add: “The Board shall notify the complainant and each respondent of its determination within 10 working days of receipt of the complaint.”

Response: The requested revision is already provided for in Subsection (c).

- Subsection (b). Add: “The complaining party and each respondent may thereafter be permitted to file an amended complaint ...”

Response: Because the complaint has not been accepted, there is no pleading for the respondent to respond to.

- Add: “The amended complaint, if any, shall be simultaneously served on the Board and each respondent.”

Response: The requested revision is rejected for those reasons set forth in the Response to Section 56.1(b), *supra*.

- Subsection (c). Add: “...notify the complaining party and each respondent of a decision to either:”

Response: Section 56.4(a) specifies when a copy of the complaint shall be served on the respondents.

4. § 56.3. Cases Referred to Investigation or Investigative Hearing.

- Subsection (a). It is unclear what an “investigative hearing” is as compared to what an ALJ conducts as an informal hearing. Will these investigative hearings be subject to any due process guidelines or procedural guidelines?

Response: The provision permitting the Executive Officer to conduct an investigative hearing has been eliminated.

- Specific causes provided by Government Code section 19572 should be stated.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-13-

Response: The requested information is already provided for in Section 56.5(c).

- The activity specifically described herein constitutes the practice of law which non-ALJ investigators may not be licensed to do. Provision that investigators may “take any other action to ensure a fair and expeditious investigation and/or investigative hearing” is overbroad and vague. It cannot be determined what “any other action” might encompass. What is the authority by which investigators issue subpoenas as a judicial act?

Response: Government Code sections 18670 – 18683 specifically authorize the Board, or its designated representative, to conduct investigations and hearings, including issuing subpoenas and taking depositions. With respect to the Executive Officer, or his or her designee, conducting an investigative hearing, the provision permitting the Executive Officer to conduct an investigative hearing has been eliminated.

5. § 56.4. Cases Referred to Informal Hearing Before an ALJ.

- Subsection (a)(2). The reality is that 20 days for an agency to investigate and prepare a response to be signed under penalty of perjury by a respondent is unrealistic.

Response: Although the time frame is short, Government Code section 19683 requires that a hearing or investigation be conducted, and a Notice of Findings issued, within 60 working days of the SPB’s acceptance of the complaint. The response period will necessarily, therefore, be short.

- Subsection (b). Add: “The administrative law judge shall have full authority to question witnesses, inspect unprivileged and unprotected documents, ... and otherwise conduct the hearing in the manner that does not deny due process to any party and to the degree he or she deems appropriate.”

Response: The requested revision is not necessary, as the Board cannot issue or interpret regulations in such a manner that negates any judicially recognized privileges, or that improperly denies any party due process of law.

- Add: “All parties, upon request, shall be provided with a copy of the recording of the informal hearing.”

Response: The requested revision has been made.

- Subsection (c). Add: “... the administrative law judge shall issue and simultaneously serve on all parties findings for consideration by the Executive Officer regarding the allegations ...”

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-14-

Response: Because the proposed Notice of Findings is not a final decision, but instead is only a recommendation being made to the Executive Officer, there is no requirement that a copy of the document be served on the parties.

- Does the “recommended relief” include the issuance of an adverse action? Proposing a remedy where there has only been an informal hearing deprives the individual respondents of due process and the right to a pre-deprivation hearing under Skelly.

Response: The pre-deprivation rights required by Skelly v. State Personnel Board (1975) 15 Cal.3d 194, are not applicable here, because no disciplinary action will be taken against an employee until either: (1) the employee has timely requested and received a full evidentiary hearing pursuant to Section 56.5(d) and 56.8, or (2) the employee fails to timely request a hearing, thereby waiving his/her right to appeal any disciplinary action recommended in the Notice of Findings.

6. § 56.5. Findings of the Executive Officer.

- Subsection (a). The term “accepts the complaint” needs definition: is this the date upon which the Board determines the complaint meets the requirements provided by § 56.2(a) or (b), or is it the date upon which the Board notifies the complainant (and should also notify the respondent) pursuant to proposed regulation § 56.2(c) of its action on the complaint or the amended complaint?

Response: The requested clarification has been made.

- Subsection (b). Change “free to file” to “may.”

Response: The requested clarification has been made.

- Subsection (c). This usurps the appointing power’s prerogative to determine the level and type of discipline.

Response: Government Code section 19683 expressly grants the Executive Officer authority to initiate disciplinary proceedings against an employee.

- Subsection (d). What about pre-deprivation rights? The findings seem to issue after an informal, non-evidentiary and non-judicial process. This is really just an investigative report. The full Board should issue a proposed Notice of Findings after a review of the report with the time to file an appeal measured from that issuance.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-15-

Response: The pre-deprivation rights required by Skelly v. State Personnel Board (1975) 15 Cal.3d 194, are not applicable here, because no disciplinary action will be taken against an employee until either: (1) the employee has timely requested and received a full evidentiary hearing pursuant to Section 56.5(d) and 56.8, or (2) the employee fails to timely request a hearing, thereby waiving his/her right to appeal any disciplinary action recommended in the Notice of Findings.

7. § 56.6. Disciplinary Action for Proven Retaliatory Acts.

- Subsection (d)(1). The proposed regulation should cite to Section 56.5(d), as opposed to subsection (c).

Response: The incorrect citation has been corrected.

8. § 56.7. Consolidation with Other Hearings.

- The proposed regulation does not provide for a procedural mechanism to request or order consolidation. While it provides for a right to discovery, it should require the ALJ to provide sufficient time to allow all parties to engage in discovery, not less than the time provided in the discovery regulations.

Response: The requested clarification has been made.

C. SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 1000 (CSEA)

1. Clarify whether service must be made in calendar or working days.

Response: The requested clarification has been made.

2. If service is made by mail, and service is not deemed effective on the date of mailing, the regulations should clarify that matter.

Response: The requested clarification has been made.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-16-

3. § 56.2. Acceptance of Whistleblower Complaint.

- Subsection (b). Complainant's should be afforded a right to amend a deficient complaint. The term "may" should be changed to "shall."

Response: There may exist situations where permitting an amended complaint to be filed would be pointless (e.g., the complaint is filed by a county employee; the protected disclosure did not constitute a report of improper governmental activity). As a result, the requested revision will not be made.

- Subsection (c)(3). Should reference Section 56.4, not Section 56.3.

Response: The incorrect citation has been corrected.

4. § 56.3. Cases Referred to Investigation or Investigative Hearing.

- Not sure what investigative hearing is and what procedural safeguards apply. There should only be an investigation, and leave the hearing process to the informal and formal hearings conducted by administrative law judges.

Response: The provision permitting the Executive Officer to conduct an investigative hearing has been eliminated.

5. § 56.4. Cases Referred to Informal Hearing Before an ALJ.

- Subsections (c) and (d). When do the findings issue by the ALJ after the informal hearing? How long does the Executive Officer have to adopt, modify, or reject the proposed findings and remedies? Give a lot of discretion to the Executive Officer.

Response: The Executive Officer is required to issue the final Notice of Findings within 60 working days of the date that the SPB accepts jurisdiction over the complaint. The ALJ, therefore, must necessarily issue his/her proposed notice of findings for review by the Executive Officer within that time frame. Because it is ultimately his/her Notice of Findings, the Executive Officer necessarily has a great deal of discretion concerning the ultimate conclusions made.

6. § 56.5. Findings of the Executive Officer.

- Do both complainant's and respondents get to waive the 60 working days timeframe for the Executive Officer to issue his/her notice of findings? Only the complainant should be permitted to waive that limitations period.

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-17-

Response: Clarifying language has been added to specify that only the complainant can waive the 60 working days limitation period.

7. § 56.6. Disciplinary Action for Proven Retaliatory Acts.

- Subsection (d)(1). The correct citation should be to Section 56.5(d), not Section 56.5(e).

Response: The incorrect citation has been corrected,

8. Complainant should have the right to be represented by his/her own attorney. Will complainant have the right to all discovery and investigation file, or separate rights?

Response: Section 56.8(d)(1) authorizes a complainant to be represented by his/her own legal representative. As a party, the complainant can conduct discovery in accordance with the provisions of Section 57 *et seq.*

9. Complainant's should not be required to pay a filing fee when submitting a whistleblower retaliation complaint to the SPB.

Response: The regulations do not require that a filing fee be paid.

10. What protections are provided to employees who testify at SPB hearings, and are employers required to give employees paid time off to appear as witnesses at a hearing?

Response: Employees are entitled to the same protections against retaliation for participating in a whistleblower retaliation complaint hearing as they are afforded for participating in any other type of hearing conducted by the SPB. If a state civil service or community college employee is served with a valid subpoena issued by the SPB commanding his/her appearance to testify at an SPB hearing, the employer must authorize the employee's paid time off to appear at the hearing. As with any other type of evidentiary hearing, witness fees may have to be provided to the employing entity.

11. Respondents should not be permitted to file a Request-to-File-Charges against an unsuccessful complainant, as that constitutes the ultimate retaliatory act. If such punitive actions are permitted, punitive damages should be available to a complainant whenever any allegation of retaliation is substantiated, regardless of how miniscule.

Response: The SPB cannot prohibit any respondent from filing a Request-to-File-Charges against an unsuccessful complainant pursuant to the provisions of Government Code section 19583.5, as the statute does not contain such exclusionary

ATTACHMENT A

Comments – Whistleblower Retaliation Complaint Regulations

-18-

language. With respect to the award of punitive damages, the Board is not authorized to award punitive damages in a whistleblower retaliation complaint case. Instead, only the superior court is authorized to do so, pursuant to Government Code section 8547.8(c).

D. STATE PERSONNEL BOARD

The following amendments were made as a result of internal discussions with SPB staff:

1. § 56.2. Acceptance of Whistleblower Complaint.

This is a non-substantive amendment. Subdivision (d) was added simply to provide notice to complainants that Penal Code section 6129 authorizes the SPB to, in those situations where the Office of the Inspector General is investigating a similar complaint filed by the complainant, defer acting on the complaint filed with the SPB until such time as the Office of the Inspector General completes its investigation. This is a non-substantive amendment.

2. § 56.6. Disciplinary Action for Proven Retaliatory Acts.

This is a non-substantive amendment. Subsection (1) to subdivision (a) was added simply to provide notice to respondents that Government Code section 6129(c)(3) mandates that Department of Corrections and Rehabilitation employees who are found to have engaged in retaliation must receive, at a minimum, a 30 days suspension without pay, unless the Board provides written justification for a lower penalty.

3. § 57.7. Consolidation with Other Hearings.

This is a non-substantive amendment. Subsection (a) was added simply to provide notice to the parties that Government Code section 19683 permits the SPB to consolidate reasonably-related cases into one hearing, and to clarify that if one or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date.

TO: STATE PERSONNEL BOARD

FROM: BRUCE MONFROSS, Senior Staff Counsel
Chief Counsel's Office

REVIEWED BY: ELISE ROSE, Chief Counsel
Chief Counsel's Office

SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 57.1
THROUGH 57.4 – DISCOVERY IN EVIDENTIARY HEARINGS
REGULATIONS

REASON FOR HEARING AND BACKGROUND:

State Personnel Board (SPB) staff proposes modifications to the Discovery in Evidentiary Hearings regulations, which were originally proposed in a NOTICE OF PROPOSED REGULATIONS AND STATEMENT OF REASONS dated July 8, 2005 (attached) and the subject of public hearings conducted on August 30 and October 3, 2005. The full text and a discussion of the proposed changes being recommended are attached.

Comments received at the hearings and in-writing during the 45-day comment period ending August 22, 2005, have been given full consideration. Responses to comments received are attached. The proposed modifications were made available to interested parties in the attached NOTICE OF MODIFICATION OF PROPOSED REGULATIONS AND PUBLIC HEARING dated November 11, 2005.

Copies of the final text of these rules without strikeout and underline will be made available to the five-member State Personnel Board (Board) and public at the time of hearing.

REGULATORY SUMMARY:

Based upon a review and analysis of all comments received, staff recommends that clarifying changes be made to the proposed regulations, as summarized in Attachment A.

RECOMMENDATION:

It is recommended that the Board adopt the proposed amendments to Title 2, California Code of Regulations §§ 57.1 through 57.4, as shown in the current calendar.

ATTACHMENT INDEX

NOTICE OF PROPOSED MODIFICATIONS OF REGULATIONS AND PUBLIC
HEARING dated November 11, 2005 and PROPOSED TEXT OF THE AMENDED
REGULATIONS

Attachment A: Comments – Discovery in Evidentiary Hearings Regulations - Page 53



**NOTICE OF MODIFICATIONS OF PROPOSED REGULATIONS
AND PUBLIC HEARING**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: November 11, 2005

TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET

SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 57.1
THROUGH 57.4 – DISCOVERY IN EVIDENTIARY HEARINGS
REGULATIONS

Under the authority established in Government Code (GC) § 18701, and pursuant to GC § 11346.8(c), the State Personnel Board (SPB) is providing notice of changes that are being considered concerning the above-named regulations, which were the subject of public hearings held in August and October 2005. As a result of written comments and oral testimony received, parts of the regulations have been modified from what was originally made available. Please take notice that a public hearing regarding the modifications to the original proposed regulations made available is scheduled for:

Date and Time: December 6, 2005 – 10:00 a.m. to 10:30 a.m.

Place: 455 Golden Gate Avenue, Benicia Room
San Francisco, CA 94102

Purpose: To receive comments about this action.

A copy of the full text of the regulations as originally proposed and the modifications are attached. SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m. at 801 Capitol Mall, Room 555, Sacramento, CA 95814.

Modifications to Discovery in Evidentiary Hearings Regulations
November 11, 2005
Page Two

WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close on Monday, November 28, 2005 at 5:00 p.m. Any person may submit written comments about the proposed modifications. To be considered by SPB, written comments must be received by Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During this comment period, written comments may also be e-mailed to Bruce Monfross at bmonfross@spb.ca.gov or faxed to (916) 653-4256.

Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross at (916) 653-1403. Questions regarding the regulatory process in conjunction with these regulations may be directed to Elizabeth Montoya, the backup contact person, at (916) 654-0842 or TDD (916) 653-1498.

/s/Laura M. Aguilera

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulations

REGULATIONS GOVERNING DISCOVERY IN EVIDENTIARY HEARINGS

Changes to the original text are illustrated in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a “-“, *italicized text* with a single underline indicates original proposed changes due to clerical error were inadvertently designated as being deleted instead of added, and additions to the language originally proposed are *double underlined* and italicized.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations ARTICLE 4. Hearings and Appeals

§ 57.1. Discovery in Evidentiary Hearings ~~Other than Adverse Actions;~~ ~~Exclusive Provisions Before the Board or a Board Administrative~~ ~~Law Judge.~~

The provisions of Section 57.2 – 57.4 provide the exclusive right to and method of discovery for evidentiary hearings conducted before the Board and/or Board administrative law judges concerning appeals from discrimination (Sections 54 and 54.2), and when a petition for hearing is granted from the Notice of Findings issued in relation to a complaint of whistleblower retaliation (Sections 56– 56.8). These provisions shall also apply when discrimination or retaliation is raised as an affirmative defense in an answer or appeal filed with the Board pursuant to the provisions of Section 51.2 concerning Notices of Adverse Action (Government Code Sections 19575 and 19590), Rejections During Probationary Period (Government Code Section 19175), Medical Actions (Government Code Section 19253.5), and Non-Punitive Actions (Government Code Section 19585).

(a) An employee who is served with a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19574 or 19590 shall be entitled to conduct discovery in accordance with the provisions of Government Code ~~s~~Sections 19574.1 and 19574.2. In those cases where an employee raises an affirmative defense alleging discrimination or retaliation when filing an answer to a Notice of Adverse Action pursuant to the provisions of Government Code Sections 19575 or 19590, or in those cases where an employee raises an affirmative defense of retaliation or discrimination during the course of a hearing before the Board or an administrative law judge regarding an appeal from adverse action, the appointing power or any other named respondent shall be entitled to conduct discovery regarding any such affirmative defense in accordance with the provisions of Sections 57.2 – 57.4.

(b) Any party to any other type of action scheduled for hearing before the Board and/or a Board administrative law judge, including but not limited to, rejections during probationary period (Government Code Section 19173), discrimination complaints (Government Code Section 19702), appeals from denial of reasonable accommodation

Proposed Discovery Regulations

(Government Code Section 19702), whistleblower retaliation complaints (Education Code Section 87164, Government Code Sections 8547.8 and 19683), appeals from non-punitive action (Government Code Section 19585), appeals from medical action (Government Code Section 19253.5), appeals from Career Executive Assignment termination (Government Code Section 19889.2), and appeals from constructive medical termination, shall be entitled to conduct discovery in accordance with the provisions of Sections 57.2 – 57.4.

(c) The discovery provisions set forth in Sections 57.2 – 57.4 shall not apply to those cases scheduled for hearing or review by the Executive Officer or a Board hearing officer, to informal hearings conducted by Board administrative law judges pursuant to Government Code Section 11445.10 et seq., to those cases assigned to hearing before a Board administrative law judge pursuant to the provisions of Section 52(b), to appeals from termination of Limited Term employees pursuant to Section 282, to appeals from termination of a Limited Examination and Appointment Program appointment pursuant to Section 547.57, or to any other appeal or complaint excluded from the formal evidentiary hearing process pursuant to statute or regulation.

(d) The time frames for service of process set forth in Sections 57.2 – 57.4 shall apply in those circumstances where service is made or attempted by mail, and service shall not be deemed effective on the date of mailing. Instead, service by mail shall be deemed effective only upon such time as the document being served is either actually received by the person or entity being served, or is legally presumed to have been delivered pursuant to the provisions of Code of Civil Procedure Section 1013, whichever date occurs first.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; and Sections 8547.8, 11445.10 et seq., 18670, 18671, 18672, 18672.1, 18673, 18675, 19173, 19175, 19253.5, 19574, 19574.1, 19574.2, 19575, 19585, 19590, 19683, and 19700-19706, and 19889.2, Government Code, and Section 1013, Civil Procedures Code.

§ 57.2. Request for Discovery; Statements; Writings; Investigative Reports; Witness List.

(a) Each party to ~~the~~ an appeal or complaint listed in Section 57.1(a) or (b) and scheduled for a hearing is entitled to serve a request for discovery on any other named party to the complaint or appeal as allowed by subdivisions (c) - (e), and Government Code Section 18673. All requests for discovery shall be made served on the responding party ~~no later than 36~~ 40 calendar days prior to the initial hearing date, except upon a petition and showing of good cause by the party seeking discovery, and a finding by the administrative law judge, in his or her sole discretion, that such additional or late requests for discovery should be permitted in the furtherance of justice. For purposes of this ~~§~~ Section, the term "party" is defined as the person, ~~to include~~ or appointing powers, filing the appeal or complaint, any named respondent, and his or her their designated legal representative, ~~s~~ as well as any person, to include

appointing powers, specifically identified in the appeal as a named respondent, and his or her designated legal representative.

~~(b) When an appeal is amended, all parties, other than the amending party, may serve a request for discovery on any other party to the appeal within 5 days of service of the amended appeal. Such requests for discovery shall be limited solely to those additional issues, if any, raised in the amended appeal. The administrative law judge may, in his or her discretion, extend the time period for requesting discovery under this subdivision upon a showing of good cause.~~

~~(eb) Each party to the appeal or complaint is entitled to request and receive from any other party to the appeal or complaint the names and home or business addresses of percipient witnesses to the event(s) in question, to the extent known to the other party, unless and of individuals who may be called as witnesses during the course of the hearing, except to the extent that disclosure of the address is prohibited by law. Each party to the appeal is also entitled to request and receive from any other party to the appeal the names and addresses of individuals who may be called as witnesses to testify during the course of the hearing. The responding party may, in his or her discretion, provide either the home or business address of the witness, unless except to the extent that disclosure of the address is prohibited by law.~~

~~(dc) Each party to the appeal or complaint is entitled to inspect and make a copy of any of the following non-privileged materials in the possession, custody, or control of any other party to the appeal or complaint:~~

~~(1) Statements, as that term is defined in Evidence Code Section 225, of witnesses then proposed to be called as witnesses during the hearing by the party and of other persons having personal knowledge of the act, omission, event, decision, condition, or policy which are the basis for the appeal; The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently amend this list if it intends to call additional witnesses not previously disclosed.~~

~~(2) All writings, as that term is defined in Evidence Code Section 250, that the responding party then proposes to enter into evidence; The responding party shall, upon a showing of good cause and subject to the discretion of the administrative law judge, subsequently provide the requesting party with additional writings that it proposes to enter into evidence.~~

~~(3) Any other writing or thing that is relevant to the appeal or complaint; and~~

~~(4) Investigative reports made by or on behalf of any party to the appeal or complaint pertaining to the subject matter of the proceeding, to the extent that these reports: (A) contain the names and home or business addresses of witnesses or other persons having personal knowledge of the facts, omissions or events which are the basis for the proceeding, unless disclosure of the address is prohibited by law, or (B) reflect matters perceived by the investigator in the course of his or her investigation, or (C) contain or include by attachment any statement or writing described in (A) to (C), inclusive, or summary thereof.~~

~~(e) For the purpose of this section, in those instances where an audio tape recording is provided, and all or portions of the tape are inaudible due to poor tape quality, the producing party shall, upon the request of the party requesting the discovery, provide a second, more audible, version of the tape recording, if possible. In~~

those instances where a better quality tape recording does not exist, the producing party shall provide a copy of a written transcript of the tape recording, if such transcript exists. The producing party shall not be required to produce a copy of a written transcript for any requested tape recording, if such transcript does not already exist.

(fd) All parties receiving a request for discovery shall produce the information requested, or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production, within ~~12~~ 15 calendar days of receipt of the discovery request, ~~or shall serve a written response on the requesting party clearly specifying which of those requested matters will not be produced and the basis for the non-production.~~

(e) Not less than 10 calendar days prior to the first scheduled hearing date on the merits, each party shall notify the other parties in writing of the identity and current business address of each expert witness to be presented as a witness at the hearing, and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the expert is expected to provide. At the same time, the parties shall also exchange all written reports prepared by each expert witness. The administrative law judge may permit a party to call an expert witness not included on the list upon a showing of good cause.

(g) ~~Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.~~

(h) ~~For purposes of this section, service may be accomplished by mailing the request for discovery to the home or business address of the party from whom discovery is sought. Each request for discovery shall have attached a proof of service.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Sections 225 and 250, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.3. Petition to Compel Discovery.

(a) ~~Any party claiming his or her request for discovery pursuant to Section 57.2 has not been complied with~~ A party may serve and file with the administrative law judge a petition to compel discovery, naming as responding party ~~the any party who has refused or failed to comply with~~ provide discovery as required by Section 57.2. A copy of the petition shall be served on the responding party on the same date the petition is filed with the administrative law judge. ~~For purposes of this section, service may be effected on the responding party by mailing a copy of the petition to compel discovery, with proof of service attached, to the home or business address of the responding party.~~

(b) The petition shall state facts showing the responding party failed or refused to comply with Section 57.2, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that ~~§~~ Section, that a reasonable and good faith attempt to contact the responding party for an informal resolution of the

issue has been made, and the grounds of the responding party's refusal, so far as known to the moving party.

~~(c) The petition shall be served upon the administrative law judge and responding party within 5 days after the responding party refused or failed to comply with the request, or within another time provided by stipulation, whichever period is longer. However, no petition may be filed within 15 days of the date set for commencement of the initial hearing date, except upon petition and determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.~~

~~(d) The responding party shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to compel discovery. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(e) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.~~

~~(f) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition to compel discovery or, if no answer is submitted, within 5 days of the date that such answer was due. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The parties may appear at any such hearing via telephone. The administrative law judge shall decide the petition on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(g) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is entitled to discover under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

(c) (1) The petition shall be served upon the responding party and filed with the administrative law judge within 14 days after the responding party first evidenced his or her failure or refusal to comply with Section 57.2 or within 30 *calendar* days after the request was made and the party has failed to reply to the request, whichever period is longer. However, no petition may be filed within ~~15~~ 20 *calendar* days of the date set for commencement of the administrative hearing, except upon a petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reasons for the discovery, the diligence or lack of diligence of the moving party, whether the granting of the petition will delay the commencement of the administrative hearing on the date set, and the possible prejudice of the action to any party.

(2) The responding parties shall have a right to file a written answer to the petition. Any answer shall be filed with the administrative law judge and served *on* the petitioner within ~~15~~ 10 *calendar* days of service of the petition.

(3) (A) Unless otherwise stipulated by the parties and as provided by this sSection, the administrative law judge shall review the petition and any response filed by the respondent and issue a decision granting or denying the petition within ~~20~~ 15 *calendar* days after the filing of the petition. Nothing in this sSection shall preclude the administrative law judge from determining that an evidentiary hearing *on the underlying matter* shall be conducted prior to the issuance of a decision on the petition. The administrative law judge shall serve a copy of the order upon the parties by mail and/or by facsimile transmission.

(B) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(id) A ruling of the administrative law judge concerning a motion to compel the production of evidence or to compel the attendance of a witness is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a ~~motion~~ *petition* to compel the production of evidence or to compel the attendance of a witness may, within 30 *calendar* days of the service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. ~~The hearing shall be continued pending resolution of any such interlocutory appeal.~~

(e) *The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.*

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

§ 57.4. Petition to Quash or for Protective Order.

(a) Any party claiming that a request for discovery pursuant to Section 57.2 is improper under that Section or is otherwise privileged or exempt ~~for~~ from discovery, may object to its terms by serving and filing with the administrative law judge and the party requesting the disputed discovery, a petition to quash or for a protective order. The petition shall state: (1) a description of the matters sought to be discovered; (2) the reason(s) why the matter is not discoverable under Section 57.2, or is otherwise privileged or exempt from discovery; and (3) that a reasonable and good faith attempt has been made to contact the requesting party and resolve the matter informally.

~~(b) The petition shall be served upon the administrative law judge and the party requesting discovery within 10 days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party. For purposes of this section, service may be effected on the party requesting discovery by mailing a copy of the petition, with proof of service attached, to the home or business address of the party requesting discovery.~~

~~(c) The party requesting discovery shall have a right to file a written answer to the petition. Any answer shall be served on the administrative law judge and the petitioner within 5 days of the service of the petition to quash and/or for a protective order. For purposes of this section, service may be effected on the petitioner by mailing a copy of the answer, with proof of service attached, to the home or business address of the petitioner.~~

~~(d) Where the matter sought to be protected is in the possession, custody or control of the moving party, and the moving party asserts that the matter is not a discoverable matter under the provisions of Section 57.2, or is otherwise privileged or exempt from discovery, the administrative law judge may order lodged with him or her matters provided in Section 915(b) of the Evidence Code and examine the matters in accordance with those provisions.~~

~~(e) Unless otherwise stipulated by the parties, and as provided in this section, the administrative law judge shall review the petition and any response filed by the responding party and issue a decision granting or denying the petition within 5 days of receipt of the responding party's answer to the petition. Nothing in this section shall preclude the administrative law judge from determining that an evidentiary hearing on the petition shall be conducted prior to the issuance of a decision on the petition. The~~

~~parties may appear at any such hearing via telephone. The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.~~

~~(f) The order granting the petition, in whole or in part, shall be in writing and set forth the matters the moving party is not required to produce to the party seeking discovery under Section 57.2. The administrative law judge shall serve a copy of the order upon the parties by mail, and/or by facsimile transmission. Where the order grants the motion in whole or in part, the order shall be effective on the date the order is served, and shall specifically state the date on which production, if any, is due. Where the order denies relief to the moving party, the order shall be effective on the date it is served.~~

(b) (1) The petition shall be served upon the party seeking discovery and filed with the administrative law judge within 10 *calendar* days after the moving party was served with the discovery request, or within another time provided by stipulation, whichever period is longer. No petition may be filed after the applicable time period has expired except upon petition and a determination by the administrative law judge of good cause. In determining good cause, the administrative law judge shall consider the necessity and reason(s) for the petition, the diligence or lack of diligence of the petitioning party, whether the granting of the petition will delay commencement of the hearing on the date set, and the possible prejudice of the action to any party.

(2) The party requesting discovery shall have a right to file a written answer to the petition with the administrative law judge and served on the petitioner within 5 *calendar* days of the service of the petition to quash and/or for a protective order.

(3) (A) Unless otherwise stipulated by the parties and as provided by this section, the administrative law judge shall review the petition and any response and issue a decision granting or denying the petition within 20 *calendar* days after the filing of the petition.

(B) The administrative law judge shall have the discretion to continue any evidentiary hearing or to conduct the hearing prior to the issuance of a decision on the petition.

(C) Where the matter sought to be discovered is in the possession, custody, or control of the responding party and the responding party asserts that the matter is not a discoverable matter under Section 57.2, or is privileged or otherwise exempt from disclosure, the administrative law judge may order lodged with him or her matters that are provided in Section 915(b) of the Evidence Code and shall examine the matters in accordance with the provisions thereof.

(gc) A ruling of the administrative law judge concerning a petition to quash or for a protective order is subject to review in the same manner and to the same extent as the Board's final decision in the proceeding. Any party aggrieved by the decision of the administrative law judge concerning a motion *petition* to quash the production of evidence and/or for a protective order may, within 30 *calendar* days of the service of the decision, file a petition to quash and/or for protective order in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. A party applying for judicial relief from the decision of the Board or the administrative law judge concerning any disputed

discovery issue shall give notice to the Board and all other parties to the action. The notice may be either oral at the time of the administrative law judge's decision, or written at the same time application is made for judicial relief. ~~The hearing shall be continued pending resolution of any such interlocutory appeal.~~

~~(h) The administrative law judge may, upon his or her own motion, or upon the motion of one or more parties to the action and upon a showing of good cause, exercise his or her discretion to continue the initial hearing date in order to resolve any contested discovery issues.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Section 87164, Education Code; Section 915, Evidence Code; and Sections 8547.8, 18670, 18671, 18672, 18672.1, 18673, 18675, 19683 and 19700-19706, Government Code.

ATTACHMENT A

Comments – Discovery in Evidentiary Hearings Regulations

-1-

A. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION1. § 57.2. Request for Discovery.

- Add subdivision (e). *“Not less than 10 days prior to the hearing on the merits, each party shall notify the other parties in writing of the identity and current work address of each expert witness to be presented as a witness at the hearing and a brief narrative statement of the qualifications of such witnesses and the general substance of the testimony which the witness is expected to give. At the same time, the parties shall also exchange all written reports prepared by such witnesses and each party shall have a reasonable opportunity to depose such witnesses. The administrative law judge may permit a party to call an expert witness not included on the list upon a showing of good cause.”*

Response: The requested revision has been made.

B. DEPARTMENT OF INDUSTRIAL RELATIONS1. Subject: Proposed Amendments to Regulations Concerning Discovery in Non-Adverse Action Evidentiary Hearings.

- Also applies to adverse actions when discrimination or retaliation are raised as affirmative defenses. See first bullet under “Informative Digest/Policy Statement Overview.”

Response: The requested change has been made. Due to clerical error, Section 57.1(a) was inadvertently designated as being deleted, instead of added.

2. Informative Digest/Policy Statement Overview.

- See Comment above.

Response: See Response to above Comment.

3. § 57.1. Discovery in Evidentiary Hearings Other than Adverse Actions.

- Subsection (b). Since subparagraph (a) is stricken, it is unclear what “any other type of action” refers to.

Response: See Response to above Comments.

ATTACHMENT A

Comments - Discovery in Evidentiary Hearings Regulations

-2-

- A sentence should be added that 57.2 – 57.4 applies to Adverse Actions where discrimination is raised as an affirmative defense.

Response: See Response to above Comments.

4. § 57.2. Request for Discovery.

- Subsection (a). The first sentence is inconsistent with § 57.1 which limits discovery to parties to an appeal “scheduled for a hearing.”

Response: Clarifying language has been added.

- The reference to subdivision (e) should be revised to subdivision (d), because there is no subdivision (e) listed.

Response: The requested revision has been made.

- Subsection (c). This section does not address privileged or work product materials, which are exempt from disclosure pursuant to § 57.3.

Response: Clarifying language has been added.

- Subsection (c)(1). Revise to read: “Statements, as that term is defined in Evidence Code section 225, of witnesses ~~then~~ proposed to be called as witnesses during the hearing ... or policy which are the basis for the appeal. *The responding party shall amend this list no later than X days before hearing if it intends to call additional witnesses not previously disclosed.*”

Response: Language permitting revisions to be made, with the approval of the Administrative Law Judge, has been added.

- Subsection (c)(2). It is unclear which party the proposed regulation refers to. It should be revised to state: “by the requesting party,” or “by the responding party,” depending on the intent of the drafter.

Response: Clarifying language has been added.

- Same comments as relates to Subsection (c)(1).

Response: See Response to above Comments.

- Subsection (d). Clarify whether calendar or business days.

Response: Clarifying language has been added.

ATTACHMENT A

Comments - Discovery in Evidentiary Hearings Regulations

-3-

5. § 57.3. Petition to Compel Discovery.

- Subsection (c)(3). As drafted, the ALJ has to issue a decision within 20 days of the filing of the petition. This has the effect of cutting the responding party's time for response to 5 days (instead of the stated 15 days): responding party has 15 days from service of the petition to respond to it. See § 57.3(c)(2). This anomaly appears in Government Code section 19574.2 after which the regulation is patterned.

Response: Time frames have been changed.

- Unclear whether the "evidentiary hearing" provided here would be on the discovery petition of the underlying matter.

Response: Clarifying language has been added.

- Subsection (d). Change the term "motion" to "petition."

Response: Requested revision has been made.6. § 57.4. Petition to Quash or for Protective Order.

- Subsection (c). Change the term "motion" to "petition."

Response: Requested revision has been made.

C. SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 1000 (CSEA)

1. Clarify service times for calendar days or working days.

Response: Requested revision has been made.

2. Non-lawyer litigants should be apprised that extra time has to be added when service is made by mail.

Response: Clarifying language has been added.

3. Because hearing notices are sometimes received only 40 days prior to the hearing, all hearings should be scheduled for no earlier than 60 days prior to the date of acceptance.

ATTACHMENT A

Comments - Discovery in Evidentiary Hearings Regulations

-4-

Response: The Appeals Division has agreed to comply with the requested change, unless an Expedited Hearing is requested pursuant to SPB rules.

4. It is difficult to determine who the legal representative will be for the respective appointing power.

Response: The employee will have to contact the Legal Office for the appointing power on a case-by-case basis to obtain that information, as the assigned legal representative will vary from case to case.

5. § 57.4. Petition to Quash or for Protective Order.

- Subsection (h). Why was the original Subsection (h) eliminated?

Response: Subsection (h) was moved to Subsection (b)(3)(B). Section 57.3(i) was, however, inadvertently eliminated. As a result, subsection (e) has been added to Section 57.3 to grant the Administrative Law Judge the requisite discretion to continue a hearing to resolve outstanding discovery issues.

STATE PERSONNEL BOARD

NON-HEARING CALENDAR

RE: BOARD DATE DECEMBER 6, 2005

(Cal. 12/06/05;)

MEMO TO : STATE PERSONNEL BOARD

FROM : KAREN COFFEE, Chief, Merit Employment and
Technical Resources Division

SUBJECT : Non-Hearing Calendar Items for Board Action

The staff has evaluated these items and recommend the following actions be taken:

A. BOARD ITEMS PRESENTED BY STATE PERSONNEL BOARD OR DEPARTMENT OF PERSONNEL ADMINISTRATION TO ESTABLISH, REVISE OR ABOLISH CLASSIFICATIONS, ALTERNATE RANGE CRITERIA, ETC.

PAGE

1. **THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION (CDCR)** proposes the establishment of a new classification titled Physician Assistant, Correctional Facility.

201

B. ABOLISHMENT OF CLASSES THAT HAVE HAD NO INCUMBENTS FOR MORE THAN TWO YEARS. DEPARTMENTS THAT UTILIZE THE CLASS AS WELL AS THE APPROPRIATE UNION HAVE NO OBJECTION TO THE ABOLISHMENT OF THESE CLASSES.

NONE

(December 6, 2005)

TO: STATE PERSONNEL BOARD

FROM: MARGIE IMAI, Staff Personnel Program Analyst
Department of Personnel Administration

REVIEWED BY: JOSIE FERNANDEZ, Program Manager
Department of Personnel Administration

DARYLL TSUJIHARA, Chief, Classification and Compensation Division
Department of Personnel Administration

SUBJECT: Proposed establishment of a new class of Physician Assistant,
Correctional Facility.

SUMMARY OF ISSUES:

In April 2001, Plata v. Davis was filed in federal court contending that the California Department of Corrections and Rehabilitation (CDCR) was in violation of the Eighth and Fourteenth amendments of the United States Constitution by providing inadequate medical care to prison inmates. The lawsuit was settled in June 2002 by way of a stipulation for Injunctive Relief that was approved by the Federal Court. The state entered into a settlement agreement, committing to significant changes in the delivery of health care services to inmates. CDCR has now been ordered by the courts to establish the classification of Physician Assistant to be used in the institutions.

CONSULTED WITH:

Debra Santiago, Department of Corrections and Rehabilitation
Nancy Bither, Department of Corrections and Rehabilitation
Jennifer Roche, State Personnel Board
Karen Coffee, State Personnel Board
Pam Manwiller, American Federation of State, County and Municipal Employees, BU19

In accordance with the terms of the DPA/ AFSCME contract, DPA has notified the union in writing of this proposal.

CLASSIFICATION CONSIDERATIONS:

(See attached proposal.)

RECOMMENDATIONS:

1. That the class Physician Assistant, Correctional Facility be established; the proposed specification for the class as shown in this calendar be adopted.

B. CLASSIFICATION CONSIDERATIONS

BACKGROUND

1. Provide some historical perspective about the organizational setting of the subject class(es) and the needs that this request addresses.

In April 2001, *Plata v. Davis* was filed in federal court contending that the California Department of Corrections and Rehabilitation (CDCR) was in violation of the Eighth and Fourteenth amendments of the United States Constitution by providing inadequate medical care to prison inmates. Some specific examples of key issues raised in the case include (1) the lack of nationally recognized medical guidelines for managing inmates with chronic illnesses, (2) inappropriate and inconsistent medical follow-up visits, (3) inadequate number of registered nurses, and (4) poor coordination between medical and custody staff.

The state entered into a settlement agreement, committing to significant changes in the delivery of health care services to inmates. Generally, the settlement agreement focuses on improving inmate access to health care, as well as the quality of health care services provided in the prisons. Under the agreement, independent court-appointed medical experts monitor the implementation of the agreement, and periodically report to the court on the state's progress in complying with the agreement.

CDCR has now been ordered by the courts to establish and implement the Physician Assistant classification to be used in the institution to increase inmate access to health care by providing more staff to work in prison clinics and hospitals. To be in compliance, CDCR is proposing to establish a new classification of Physician Assistant.

CLASSIFICATION CONSIDERATIONS

2. What classification(s) does the subject class(es) report to?

The Physician Assistant will be under the administrative supervision of a Health Care Manager.

The Physician Assistant will be under the clinical supervision of a physician. The supervising physician must always be available to the Physician Assistant should the need arise.

3. Will the subject class(es) supervise? If so, what class(es)?

The Physician Assistant class will not supervise.

4. What are the specific duties of the subject class(es)?

The Physician Assistant performs many diagnostic, preventative, and health maintenance services such as taking health histories; performing physical and mental status examinations utilizing diagnostic techniques; evaluating physical signs and symptoms; ordering X-rays and laboratory tests; performing routine diagnostic tests such as drawing venous blood, taking cultures, performing and reading skin tests, EKG

tracing, and pap smears; interpreting results of tests; establishing diagnoses; treating and managing patient health problems; performing routine therapeutic procedures such as injections, immunizations, removal of sutures, strapping, and casting and splinting sprains; instructing and counseling patients; providing continuing care to patients; providing preventative health care services; administering treatments and medications prescribed by physicians; performing minor surgery; acting as first or second assistant during surgery; responding to life-threatening emergencies; maintaining order and supervising the conduct of persons committed to CDCR; preventing escapes and injury by these persons to themselves, others, or to property; maintaining security of working areas and work materials; and inspecting premises and searching inmates and youthful offenders for contraband, such as weapons or illegal drugs.

5. What is the decision-making responsibility of the subject class(es)?

A Physician Assistant is a licensed and highly skilled health care professional, trained to provide patient evaluation, education, and health care services. A Physician Assistant works in collaboration with a physician to provide medical care and guidance needed by a patient.

6. What would be the consequence of error if incumbents in the subject class(es) did not perform their jobs? (Program problems, lost funding, public safety compromised, etc.)

Under standardized procedures and in collaboration with a physician, Physician Assistants assess and manage the health care needs of inmates and youthful offenders. Physician Assistants diagnose medical conditions and identify problems that require immediate consultation with a physician. Failure to do so may result in inmates and youthful offenders not receiving adequate medical services.

7. What are the analytical requirements expected of incumbents in the subject class(es)?

Physician Assistants are expected to perform physical and mental status examination utilizing diagnostic techniques; evaluates physical signs and symptoms; interprets results of tests; and establishes diagnoses.

8. What are the purpose, type, and level of contacts incumbents in the subject class(es) make?

The Physician Assistant is in contact with inmates and youthful offender in assessing and managing their health care needs. Incumbents also need to maintain good working relationships with other members of the health care team (i.e., physicians, registered nurses, mid-level practitioners, and other clinicians).

NEED FOR NEW CLASS (if necessary)

9. For New classes only: what existing classes were considered and why were they not appropriate?

The State does not have a Physician Assistant classification. Establishment of the proposed new class of Physician Assistant, Correctional Facility will provide another

classification in addition to the Nurse Practitioner, Correctional Facility classification to facilitate the provision of medical care to prison inmates.

MINIMUM QUALIFICATIONS

10. What are the proposed or current minimum qualifications of the subject class(es), and why are they appropriate? (Include inside and outside experience patterns.)

In order to practice in California, each Physician Assistant must pass a rigorous national examination before being licensed by the Physician Assistant Committee, which is part of the California Department of Consumer Affairs' Medical Board of California. Therefore, CDCR is proposing the following minimum qualifications:

Possession of a current Physician Assistant license for the State of California. (Applicants who do not meet this requirement will be admitted to the examination, but they must secure the required license before they will be considered eligible for appointment.)

PROBATIONARY PERIOD

☒ Six Months

11. If a probationary period other than six months is proposed, what is the rationale?

It is proposed that the probationary period be six months. Incumbents in the proposed new class will be exposed to most work assignments during the six-month period and will provide sufficient time for the supervisors to effectively evaluate job performance.

STATUS CONSIDERATIONS

12. What is the impact on current incumbents?

None

13. Will current employees move by examination, transfer, reallocation, split-off, etc.? Explain rationale.

N/A

CONSULTED WITH

14. In addition to the departmental contacts listed on the cover sheet, list the names and affiliations of persons who were consulted during the development of this proposal.

Dr. Steve Ritter, Regional Medical Director, CDCR
Carmen Hobbs, Nurse Consultant III, CDCR

CALIFORNIA STATE PERSONNEL BOARD

SPECIFICATION

Schematic Code: TH01
Class Code: 8016
Established: Revised: --
Title Changed: --

UPHYSICIAN ASSISTANT, CORRECTIONAL FACILITY

DEFINITION

Under the clinical supervision of a physician, in a State Correctional facility in the Department of Corrections and Rehabilitation, the Physician Assistant assesses and manages the health care needs of patients in primary care, acute care, and specialized clinic settings; performs and interprets physical examinations and routine laboratory, screening, and therapeutic procedures; educates and counsels patients regarding matters pertaining to their physical and mental health; maintains order and supervises the conduct of inmates or youthful offenders; protects and maintains the safety of persons and property; and does other related work.

TYPICAL TASKS

In accordance with established standardized procedures and in collaboration with a physician, provides diagnostic, preventative, and health maintenance services such as taking health histories; performs physical and mental status examinations utilizing diagnostic techniques; evaluates physical signs and symptoms; orders X-rays and laboratory tests; performs routine diagnostic tests such as drawing venous blood, taking cultures, performing and reading skin tests, EKG tracings, and pap smears; interprets results of tests; establishes diagnoses; treats and manages patient health problems; performs routine therapeutic procedures such as injections, immunizations, removal of sutures, strapping, and casting and splinting sprains; instructs and counsels patients; provides continuing care to patients; provides preventative health care services; administers treatments and medications prescribed by physicians; performs minor surgery; acts as first or second assistant during surgery; responds to life-threatening emergencies; maintains order and supervises the conduct of persons committed to the California Department of Corrections and Rehabilitation; prevents escapes and injury by these persons to themselves, others, or to property; maintains security of working areas and work materials; and inspects premises and searches inmates and youthful offenders for contraband, such as weapons or illegal drugs.

MINIMUM QUALIFICATIONS

Possession of a current Physician Assistant license for the State of California. (Applicants who do not meet this requirement will be admitted to the examination, but they must secure the required license before they will be considered eligible for appointment.)

KNOWLEDGE AND ABILITIES

Knowledge of: The laws and regulations governing Physician Assistants, disease conditions and procedures involved in treatment and diagnosis of these conditions, basic pharmacology, concepts in clinical medicine and surgery, mental health and preventive medicine, and routine laboratory and screening techniques.

Ability to: Interview patients and compile complete and accurate medical histories; perform routine physical examinations; observe and evaluate patients' mental health status; diagnose medical conditions and identify problems that require immediate consultation with a physician; assess and manage the care of patients; provide health education and counseling to patients; maintain good working relationships with other members of the health care team; and prepare and maintain clear and concise patient case records and reports.

SPECIAL PERSONAL CHARACTERISTICS

Empathetic understanding of patients in a State correctional facility; willingness to work in a State correctional facility; alertness; keenness of observation; tact; patience; and emotional stability.

SPECIAL PHYSICAL CHARACTERISTICS

Persons appointed to this position must be reasonably expected to have and maintain sufficient strength, agility, and endurance to perform during stressful (physical, mental, and emotional) situations encountered on the job without compromising their health and well-being or that of their fellow employees or that of inmates or youthful offenders.

Assignments may include sole responsibility for the supervision of inmates or youthful offenders and/or protection of personal and real property.